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Massachusetts Law Quarterly

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RECORD OF THE FIFTY-FIRST ANNUAL MEETING OF THE MASSACHUSETTS BAR ASSOCIATION

June 11, 1960

The Fifty-First Annual Meeting of the Massachusetts Bar Association was duly called and held at 2:30 p.m., Saturday, June 11, 1960 at the Mayflower Hotel, Plymouth, Massachusetts.

Because of the disabilities of President Gerald P. Walsh and of Vice-President Harold Horvitz who had been designated by the Executive Committee to perform the President's duties, the meeting was called to order by Vice-President James H. Fitzgerald upon the designation of the Executive Committee. Referring to the wide experience of past president Robert W. Bodfish as a presiding officer, Mr. Fitzgerald asked that unanimous consent be given to having the meeting conducted by Mr. Bodfish. Such consent was so given, whereupon Mr. Bodfish assumed the chair and presided for the balance of the meeting.

Upon motions severally duly made and seconded, it was unanimously voted to waive the reading of the call of the meeting and the minutes of the last annual meeting.

Treasurer's Report

Treasurer Milton J. Donovan then presented his written report, a summary of which appears on page 93. Upon motion duly made and seconded, it was unanimously:

VOTED: That the Treasurer's report be accepted and placed on file.

Report of the Committee on Legislation

For the Committee on Legislation, Chairman Livingston Hall made an oral report. He referred to the first Newsletter for a summary of the Committee's activities and also stated that at the conclusion of this annual meeting the Committee was to meet with representatives of city and county bar associations with a view to establishing procedures for common action. Without making a recommendation, Mr. Hall asked that during the ensuing year there be consideration of the advisability of engaging a paid legislative secretary. Upon motion duly made and seconded, it was unanimously

VOTED: That the report of the Committee on Legislation be accepted.

Report of Executive Director Albert West

Executive Director Albert West reported on headquarters changes during the past year, describing the new mailing equipment and the inauguration of the Newsletter. Beginning in the fall of 1960, the Newsletter will be published monthly. Mr. West also described the continued conduct of the Heritage Program and the American Bar

Association pamphlet "Law and Courts in the News, a Layman's Handbook of Court Procedure." Five hundred copies of this pamphlet had been purchased upon the authorization of the Board of Delegates and, with a special insert showing the Massachusetts judicial system, had been distributed to the press and to radio and television stations. The response has been excellent. Upon motion duly made and seconded, it was unanimously

VOTED: To approve the report of Executive Director Albert West.

Resolutions in Honor of President Gerald P. Walsh

Upon motions of Milton J. Donovan, each motion being duly made and seconded, it was, by a standing vote, unanimously

RESOLVED: That we, the members of the Massachusetts Bar Association in annual meeting assembled, deeply regret the absence of our President Gerald P. Walsh. We remember the sincerity with which he pledged the purposes of his administration and the ability he showed in undertaking their fulfillment. Already we have noted the appointment of the Committee on Juvenile Delinquency and the first edition of the Newsletter, both part of his planning. We cannot give our beloved President his health but we can and do pledge to him our best efforts for this Association which is so close to his heart.

RESOLVED: That it is the consensus of the members of the Massachusetts Bar Association in annual meeting assembled that the Board of Delegates cause the necessary funds to be raised and appropriated for a scholarship to be awarded by a law school of its choice in honor of our President Gerald P. Walsh.

AND BE IT FURTHER RESOLVED: That these resolutions be spread upon the records of this meeting and a copy be sent to our esteemed friend and fellow member to whom they are addressed, and a copy thereof be inserted in the next edition of the Newsletter for distribution to the members of this Association.

Amendment of the Bylaws

Milton J. Donovan presented a proposal, contained in the notice of the meeting, to amend Article XVI, section 1, of the bylaws. After discussion and a minor amendment of detail, and upon motion duly made and seconded, the proposal as amended was unanimously adopted by the following vote:

VOTED: That Article XVI, Section 1 of the bylaws of the Association is hereby amended by adding thereto the following:

"The dues for persons who shall have reached the age of seventy, or who shall have retired from practice of the law by reason of disability, or who do not maintain an office for the practice of the law within the Commonwealth, shall be twelve dollars ($12) per year;

provided, however, that application for such reduction in dues shall be made in writing to the Treasurer whose determination of the facts shall govern, subject to an appeal therefrom by the applicant to the Executive Committee for final determination."

Election of Officers and Members of the Board of Delegates

Because of the disability of the chairman of the Nominating Committee, Joseph Schneider, the Nominating Committee's report, contained in the notice of the meeting, was presented by committee member Michael Carchia. Its nominations were as follows:

President

HAROLD HORVITZ, Cambridge

Vice-Presidents

SUMNER H. BABCOCK, Wellesley
ANNA E. HIRSCH, Dedham
JAMES H. FITZGERALD, Brockton
LAURENCE H. LOUGEE, Worcester
HENRY R. MAYO, JR., Lynn

Secretary

ALAN J. DIMOND, Brookline

Treasurer

MILTON J. DONOVAN, Springfield

Members at Large—Board of Delegates

DANIEL E. BURBANK, JR., Springfield
THOMAS M. A. HIGGINS, Lowell
MICHAEL CARCHIA, Belmont
RICHARD B. JOHNSON, Swampscott
ELY H. CHAYET, Brookline
ALBERTUS D. MORSE, Northampton
ROBERT G. CLARK, Brockton
BLANCHE M. QUAID, Boston
ROBERT F. DRINAN, S.J., Boston
PHILIP L. SISK, Lynn
LIVINGSTON HALL, Concord
PAUL A. TAMBURELLO, Pittsfield

The Nominating Committee's report also recommended that the position of Secretary Emeritus be created without any duties attaching to the position and that Frank W. Grinnell of Boston be elected to it.

No other nominations for officers or the Board of Delegates having been made, it was, upon motion duly made and seconded, unanimously

VOTED: That the report of the Nominating Committee be accepted and that the Secretary be instructed to cast one ballot for the persons nominated as officers and members of the Board of Delegates.

The Secretary thereupon cast the ballot and the nominees were declared duly elected.

Upon motion duly made and seconded, amended by Raymond F. Barrett of Quincy to express more fully the Association's warm sentiments, it was then unanimously

VOTED: To create the position of Secretary Emeritus without any duties attached to the position and in appreciation of his years of devoted service to the Associa-

tion and as an expression of the Association's esteem and affection for him, to elect Frank W. Grinnell of Boston to this new position.

Summary of the Report of Incoming President Harold Horvitz

Because of the disability of incoming president Harold Horvitz, certain matters that he would have presented to the meeting were outlined by Mr. Bodfish. These matters related to the great service of President Gerald P. Walsh, the headquarters program, the committee of the press and lawyers, the services of the Executive Director, the Newsletter, the Grievance Committee, the Committee on Juvenile Delinquency, the Committee on Legislation, the Committee on Unlawful Practice of Law, a Committee on Continuing Legal Education, the Committee on the Junior Bar, the possible establishment of a Lawyers Referral Service, a Committee on Judicial Selection, a Visiting Committee for the Massachusetts Law Quarterly, and a House and Finance Committee.

Resolution for Incoming President Harold Horvitz

Upon motion duly made and seconded, it was unanimously

RESOLVED: That we, the members of the Massachusetts Bar Association in annual meeting assembled, express to our incoming President Harold Horvitz our deep sympathy in his illness, we extend to him our best wishes for a quick recovery, and we pledge to him our full support in his leadership of the Association.

Resolutions for James H. Fitzgerald and Bertha R. Kiernan

Upon motion duly made and seconded, it was unanimously

RESOLVED: To extend to James H. Fitzgerald, the general chairman of the annual meeting, and to Bertha R. Kiernan, the chairman of the ladies committee, deep appreciation for their devoted work and outstanding results.

Miscellaneous

There was a brief discussion about the location of next year's annual meeting. Reuben Winokur of Plymouth requested that next year there be earlier notice of the annual meeting.

There being no further business to come before the meeting, it was, upon motion duly made and seconded, unanimously

VOTED: To adjourn.

The meeting thereupon adjourned at 4:00 p.m.

A true record.

Attest:

ALAN J. DIMOND,
Assistant Secretary

REPORT OF THE 19th MASSACHUSETTS LAWYERS INSTITUTE AND CONVENTION

At Plymouth, June 10, 11 & 12, 1960

Once again, the annual Institute and Convention of the Massachusetts Bar Association accomplished its purpose—the bringing together of many of the lawyers of Massachusetts into closer social and professional relations with each other.

This account of the panel sessions and activities is published here in accordance with established custom.

The convention opened with the Friday luncheon, which was enjoyed by all as guests of the Association.

Friday afternoon's program consisted of a panel discussion on "Juvenile Delinquency" and was most interesting.

Our particular thanks is due John H. Fletcher Calver, who at the very last minute stepped in as Chairman because of the unavoidable absence of James D. St Clair. On the panel were James B. Muldoon and Joseph Ambrose, Supervisor of Special Services of the Youth Service Board. Hon. James A. Mulhall, Special Justice of the District Court of East Norfolk made a valuable contribution to the lively discussion which ensued. Mr. St. Clair arrived in time to keep the panel going until long after it was scheduled to end.

The Committee chosen to represent the Massachusetts Bar Association in combatting increased juvenile disorders demonstrated that it has a grasp of and sense of responsibility of this social evil and undoubtedly will be a most helpful influence in aiding other agencies of society in alleviating the problem.

The Ladies' program, under the Chairmanship of Bertha Kiernan, was carried out from beginning to end as scheduled and everyone present got in the fun and had a delightful time—and of course there were fabulous prizes. Our hats off to Bertha and all the lovely ladies who assisted her.

Those lawyers, expert and non-expert alike, who left their desks and the needs of their clients to learn something from the panel discussions were well rewarded. They must have taken home many ideas helpful to their practice.

The topic: "After Conviction—What?" was ably presented by the always dependable Livingston Hall, of Harvard Law School, as Chairman, assisted by such well informed speakers as Donald H. Russell, M.D., Director of the Court Clinic Program, Division of Legal Medicine of the Department of Mental Health, The Honorable Reuben L. Lurie, Associate Justice of the Superior Court of Massachusetts, and Former Commissioner of Correction and Chairman of the Parole Board, and the Honorable Myron N. Lane, District Attorney of Norfolk County. Their able and informative presentation was greatly appreciated by the audience.

The other panel discussion, presided over by the Rev. Robert F. Drinan, S.J., Dean of Boston College Law School, dealt with "Work-

man's Compensation for the Common Lawyer." A prominent expert in the field was so impressed with this panel that he remarked, "Those who missed this panel should be given the advantage of publication of the speaker's remarks in the Massachusetts Law Quarterly. Every lawyer could use the technique suggested with effective results."

Credit for such a professionally excellent job is due to the Chairman of the panel, to Lawrence Locke (for the employees), to Walter I. Badger, Jr. (for the Insurer) and to Eugene F. Giroux, former Chairman and present member of the Industrial Accident Board.

At the Saturday luncheon, the Honorable Frank R. Kenison, Chief Justice, New Hampshire Supreme Court, spoke informally and his remarks were enthusiastically received. Incidentally, he stated that the New Hampshire Supreme Court usually followed the precedents established by the Supreme Judicial Court of our own great Commonwealth.

Following the Saturday luncheon, the 49th annual meeting and election of officers was held. It was ably opened by Stanley Milton, and then turned over to Robert W. Bodfish, a former past president of the Association, who conducted the balance of the meeting in his usual superior manner.

A detailed report of this meeting is published in this issue of the Quarterly on page 2.

At the close of the Convention, Saturday evening, another past president of the Association, Raymond F. Barrett, came to our aid and presided. After introducing the members and distinguished guests at the head table, he called upon the Honorable Paul C. Reardon, Chief Justice of the Superior Court and upon the Honorable Arthur J. Whittemore, Associate Justice of the Supreme Judicial Court, both of whom responded with timely and interesting remarks about their respective Courts.

The Honorable Frederic J. Muldoon, Chairman of the Judicial Council, then presented the Gold Medal on behalf of the Association to our own Frank W. Grinnell.

The convention was brought to a close by the principal speaker, Honorable Cody Fowler, former president of the American Bar Association, who spoke in a charming vein on the role of the present day lawyer.

Your chairman wishes to thank and commend all who carried out, with signal success, the various and numerous duties assigned to them, particularly the panel speakers, the past presidents and the Ladies Committee. The combined efforts of all contributed toward making this institute and convention a success.

JAMES H. FITZGERALD, *Chairman*

SALUTATION OF FREDERIC J. MULDOON ON HIS PRESENTATION OF THE MASSACHUSETTS BAR ASSOCIATION GOLD MEDAL TO FRANK W. GRINNELL

At the Association Dinner at Plymouth on June 11, 1960

Mr. President, Mr. Chief Justice, Honored Guests, Members of the Judiciary, Fellow Toilers in the Field of Law, and Friends:—

I think that most of you know that I am supposed to make a few brief remarks about Frank Grinnell. I find myself somewhat in the same position that confronted Daniel Webster when he was asked to make a speech in praise of Massachusetts.

If my memory serves me right, Webster said he would not enter upon any encomium.

"Massachusetts, there she stands," he said.

Well, Frank Grinnell, there he sits.

Many of you know "F.W.G." as Editor-in-Chief of the MASSACHUSETTS LAW QUARTERLY. This year, we publish the forty-fifth volume of our quarterly with Frank as Editor.

I wonder how many of us realize that the legal history of this Commonwealth for the past two generations has been reported and in many instances actually shaped by Frank Grinnell.

In addition to his literary activities, of which his work for the Quarterly is but a part, Frank has been Secretary of the Massachusetts Bar Association since 1915.

He has represented us and our Association at meetings of the American Bar Association for many, many years.

He has been Secretary of the Judicial Council since it was formed in 1925, and was Secretary of the Judicature Commission which preceded it.

Frank Grinnell's work for others can not be described in any remarks I might make here. As Plymouth Rock is a symbol of the courage and determination of men who sought liberty, Frank's life and work stands for all time as a symbol of man's continuing struggle for a government under just laws.

Combined with his courage and determination to fight and write for justice and common sense is Frank's wonderful sense of humor and his thorough enjoyment of life.

I can not express to you what a great honor it is for me now to present this Massachusetts Bar Association Gold Medal to

FRANK W. GRINNELL
Lawyer, Scholar
And Good Friend

CAN A CONVENTION BE CALLED BY INITIATIVE PETITION?

A WARNING LETTER TO THE PRESS RECENTLY PUBLISHED

Statements have recently appeared in the press that a group of citizens are planning to start an initiative petition to force the calling of a Constitutional Convention. If that is so I respectfully call their attention, before they waste time and effort in attempting to collect thousands of signatures, to the fact that such a petition cannot be used for that purpose as it is not authorized by the Constitution and would be waste paper even if the signatures are collected.

It is not generally known that such a petition was filed in 1924, a few years after the Initiative and Referendum amendment was adopted. As the necessary number of signatures was not collected the question did not then arise for consideration by the legislature or the Court. The fact that a petition was started, however, showed that it was a practical question which might arise in the future. In order that the legal problem might be understood by the legislature, the public and the legal profession, at the suggestion of Hon. B. Loring Young, then Speaker of the House, it was discussed, at length, in the light of the nature, purposes and history of our constitutional structure, and of the I. and R. amendment, in the MASSACHUSETTS LAW QUARTERLY for July, 1924.

That study resulted in the conclusion that "such a petition, even if circulated, signed and filed with the Secretary of the Commonwealth would have no legal effect whatever, that he would be under no duty to transmit it to the House, and if he did transmit it, the House would be under no duty to consider it or vote on it and that the question could not be forced on to the ballot."

By the Constitution, certain matters are specifically excluded from the initiative and referendum procedures. The constitution also provides that "no part of the constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the subject of an initiative petition." As a petition for a constitutional convention involves everything in the Constitution, whether excluded or not, it would seem that if such a petition is filled, the attorney general cannot, as he is required by the constitution to do, certify *"that it contains only subjects not excluded from the popular initiative."*

In order that those who plan to circulate such a petition and the thousands of citizens who might be asked to sign it may be warned in advance of its illegality, I call the matter to the attention of your readers. The complete discussion will be reprinted for convenient reference in the July issue of the MASSACHUSETTS LAW QUARTERLY.

F. W. GRINNELL

THE DISCUSSION IN 1924

Does the I. and R. Amendment Authorize an "Initiative" Petition for Another Constitutional Convention?

(Reprinted from the "Quarterly" for July, 1924)

To many members of the bar the discussion of the meaning of constitutional questions, especially under the recent amendments, seems somewhat academic. They assume that the questions involved are remote from immediate practical problems and that they need not bother about them. The filing of an "initiative" petition last October for another constitutional convention, however, brings into the immediate foreground very practical questions involving the foundations of the State government, of which the bar in general and the public are complacently unaware. The purpose of this article is to explain these questions and attempt to answer them. The fact that the ruling of the attorney general on the "initiative" problem is questioned, is not to be regarded as a criticism of the properly cautious attitude of the Attorney General's Department in ruling upon so involved a question submitted to him in the midst of other business.

The "initiative" petition for a convention, which suggested this discussion, was not signed by the required number of registered voters before the time for completing signatures expired on December 5, 1923. Accordingly the question did not arise for immediate consideration at the recent session of the legislature. The fact that the petition was started, however, shows that it is a distinctly practical question which may arise at the beginning of any legislative session. Accordingly the legal problem should be understood by the legislature and the bar and thought about in advance of the occasion when it must be answered.

The Way in Which the Question of Law Would Arise.

If such a petition should at any time receive the number of signatures required for "initiative petitions" and be transmitted by the Secretary of the Commonwealth to the Clerk of the House of Representatives, the "important question of law" in the language our constitution would arise, whether the documents transferred had any legal character or effect which gave rise to any constitutional duty on the part of the legislature. Upon the transmission of legal initiative petitions, the I. and R. amendment provides that "The proposed measure shall then be deemed to be introduced and pending," and it becomes the duty of the legislature to consider it in the manner specified in the amendment, and the right of petitioners to force the question on to the ballot arises after the consideration by the legislature and its failure to pass what the petition requests. If the petition thus transmitted, however, is not legally authorized, of course, it has no more legal effect than a piece of blank paper and the legislature has no duties in regard to it. It would probably be found advisable, therefore, in the case of the transmission of such a paper, for the House to call for an ad-

visory opinion of the justices as to the effect of the papers transmitted and the duty of the House in regard to them, in order that the time of the legislature might not be taken up with unnecessary discussion of an unauthorized petition. The question might also be raised perhaps by the Governor and Council in a request for an advisory opinion as to whether the Secretary of the Commonwealth had any duties at all in regard to such a petition and whether or not he should transmit it to the House. Of course, the question might also arise at later stages in some form of litigation.

The following discussion appeared in the *Springfield Union*, the *Springfield Republican*, and the *Lowell Courier-Citizen* for October 25, 1923, and is here reprinted for permanent reference.

A Letter to the Press.

"As reported in the press an 'Initiative' petition was filed Oct. 9 with the Secretary of the Commonwealth for another constitutional convention and is now being circulated for the additional signatures necessary before it can be presented to the Legislature. The Attorney General has certified that the petition and the act filed with it are in the proper form and do not come within the matters 'excluded' by the I. and R. amendment from the operation of the 'Initiative.'

"With all due respect to the Attorney General's conclusion, I think in the pressure of other work, certain considerations have not been called to his attention and I submit that the petition is illegal, as not authorized by the Constitution. As the I. and R. amendment is based on the theory of an informed electorate, this seems a matter of sufficient importance to call for a public statement in simple language of the constitutional reasoning involved, so that the citizens may understand why the petition is illegal and why the signatures appended to it even if the required number are secured, will have no legal effect.

"The I. and R. amendment provides that constitutional amendments and 'laws' may be petitioned for by the 'initiative' with certain specified exceptions, which are expressly excluded by a clause that says no measure 'which relates' to them shall be 'proposed' or be the subject of such a petition. In other words, the Constitution provides that only constitutional amendments on specified subjects not within the excluding clause may be thus initiated. There is no authority for thus initiating any other form of action relating to the Constitution. The provision that 'laws' may be thus initiated is subject to the same exceptions as to subjects.

"The obvious reason for the clause as to 'excluded matters' was to prevent the agitation of religious and other prejudices by signature campaigns. Now the function of a constitutional convention unlimited in its scope of subjects is to consider all such matters, and, if it sees fit, to submit amendments relating to them.

"To say, therefore, that, while no one excluded subject can be thus agitated, a petition for a convention to discuss them all is

legal, is like saying that it is illegal to break one window in a house, but if all the windows are broken at once it is legal. It seems inconceivable that the courts would attribute any such extraordinary intention either to the recent convention of 1917, which submitted the I. and R. amendment, or to the voters who adopted it.

"Such a 'joker' in regard to the fundamental rights of citizens of Massachusetts would be of too serious a nature to be charged to that convention. The sound interpretation of the excluding clause, therefore, seems in itself to show the illegality of the petition now being circulated.

"But there is a still further answer. A constitutional convention is an extraconstitutional body. It is not a 'revolutionary' body in any dramatic sense, or even in the sense in which that adjective might be used in describing the original convention of 1780 which was held during the Revolution. Accordingly, the word 'revolutionary' sometimes used in discussing such bodies, is misleading, because it has vague sensational meanings.

"The powers of a convention are recognized by the Preamble and Articles 4, 5 and 7 of the Bill of Rights and Article 10 of Chapter VI of the Frame of Government, as inherent powers of the people in the background of our Government, but the machinery for their exercise is not created by the Constitution.

"The method of obtaining the evidence of the popular will for the purpose of exercising these powers, while it is extra constitutional in the sense that it is not specified, is a matter peculiarly within the legislative function as representative of all the people. The Legislature is the only body which thus represents all the people and which is entitled, therefore, to specify such methods. Unless this is recognized as part of the legislative function as a guide in determining the effect of all such proceedings, there is no test whatever, except the ultimate test of physical force, either as a fact or a threatened possibility inducing acquiescence.

"The Legislature, however, in framing the machinery for ascertaining the popular will is bound to adopt some method reasonably adapted for so solemn a purpose. If they should adopt some method which was grossly unsuited to the purpose of ascertaining the popular will, it seems that no political situation would arise as a result of such action which the courts should recognize. The constitutional convention of 1917 was planned in a reasonable manner and stood upon exactly the same footing as the Convention of 1820.

"Such being the nature and position of a convention, it is obvious that an 'act' of the Legislature to ascertain whether the people wish to call into being such an extraconstitutional body to overhaul and discuss all their fundamental rights and governmental machinery, is not a 'law' in the ordinary sense in which that word is used in connection with 'initiative' petitions under the I. and R. It is a legislative act of a unique character which from its nature and in the absence of other specific provisions in

the Constitution, can originate only in the Legislature itself as representing all the people and not merely some of the people.

"That this is so today, as it was when the conventions of 1820, 1853 and 1917 were held, is not an accident. The question of providing machinery for future conventions and for the submission of the question to the voters every 20 years was debated at length in the convention of 1917 (Debates Vol. III, pp. 1281-1301) and rejected for reasons which were summed up with striking good sense by Mr. Creed of Boston, in opposing reconsideration of the vote of rejection.

"He said:

"'The fact is there is no need of this resolution.' After referring to the I. and R. amendment and its provision for initiative and legislative proposals, he continued: 'And we also have the fact that if a situation arose in the Commonwealth, as it did in 1916, whereby the people . . . believed that there was a necessity for a convention . . . the pressure of public opinion would force the Legislature to call a constitutional convention.'

"As to the suggestion that the question should go on the ballot every 20 years, Mr. Creed said:

"'A provision to put the question of a convention on the ballot every 20 years would mean that . . . the people, perhaps, if there should be a spirited election for governor or referendum matters or the question of United States senator, might be diverted from that proposition and automatically believe that they should reply 'Yes' and have the convention called. There may be no great necessity for a convention. Specific-amendment procedure may be all that is needed by the people during that 20-year period; and yet the cities and towns, directly through the cost of primaries and election, and indirectly through the State tax, will be taxed $1,500,000 for something which is not needed at that time in this State. . . . We do not want a convention every 20 years at the cost of the taxpayers.'

"All these remarks of Mr. Creed as to the proposal for placing the question on the ballot every 20 years apply, of course, with even greater force to the idea of allowing a campaign for signatures to an initiative petition for a convention to be carried on for the purpose of putting the question on the ballot every three years or so, when any group of individuals may see fit to agitate the question.

"The convention certainly did not intend to encourage any group of secretive fanatics to agitate for proposals, perhaps like the Oregon school law, to suppress private schools, under the cloak of a petition for a convention. The petition now in circulation seems clearly illegal, and its circulation for signatures futile."

F. W. GRINNELL

Boston Oct. 24, 1923.

A Comment.

After this letter was published the writer received the following comment in answer to it:

> "In one sense, 'law' is synonymous with 'statute.' In *Swift* v. *Tyson*, 16 Pet. 1, 18, it is defined as 'a rule or enactment promulgated by the legislative authority of a State.' The word 'law' seems to be used in other parts of the Constitution in the sense of a legislative enactment. See Mass. Const., pt. II, sec. I, art. II and IV, and *Cf.* Amend. IX. *Cf.* also G. L., c. 4, sec. 1, and c. 5, heading.
>
> "I should certainly hesitate to say that Gen. St. 1916, c. 98 [the recent Convention Act] is not a law in the sense used in the Forty-eighth Amendment. It is entitled 'An Act, etc.,' contains the usual enacting clause and was approved by the Governor. In that respect it differs from a proposed constitutional amendment; nor does it purport to be a resolve, which also seems to be included within the description of laws, as that word is used in Mass. Const., pt. II, sec. I, art II.' "

Further Discussion.

This suggestion must be answered. An examination of Hoar's "Constitutional Conventions" which was published in 1917 and the references therein collected discloses the fact that authority may be found for all kinds of ideas as to the nature and position of constitutional conventions, the procedure by which they are brought into existence, their relations to other bodies, and the effect of their action. It is interesting that while the American people introduced the idea of a constitutional convention into the science of government and made it work in practice, there have been, and still are, all kinds of vague rhetorical theories as to the nature and purpose of such a body in organized society. Fortunately, the Supreme Judicial Court of Massachusetts has been particularly careful not to indulge in rhetorical theories or dogmatic assertions as to the nature of such tremendous engines of government, but have carefully confined themselves to answering specific questions when they have been submitted to them and thus have left the general subject open for consideration free from the complications of too much rhetoric.

The modern American constitutional convention originated in New England and appears to have been first publicly suggested in a resolution of the town of Concord (see frontispiece to Manual of the Convention of 1917) and, in view of all the inconsistent views which have been expressed in different parts of the country, the solution of the question in Massachusetts, when it arises, would seem to call for independent reasoning, not upon the theory that a constitutional convention is a mechanical device, but that it is, when in existence, a very human body with tremendous powers. Whatever it may be elsewhere, it is submitted that the true nature and position of a constitutional convention in Massachusetts depends on fair principles which stand out in Massachusetts history.

In the newspaper statement above quoted, it is suggested that the submission to the people of the question of calling a convention "is not a 'law' in the ordinary sense in which that word is used" in the I. and R. amendment, but that "it is a legislative act of unique character" essentially a representative action and, therefore, solely within the power of the General Court under the constitution. That this is no new suggestion is shown by the advisory opinion of the justices (Shaw, C. J., Putnam, Wilde and Morton, JJ) to the House of Representatives in 1833 (6 *Cush.*). They referred to the fact that "The constitution has vested no authority in the legislature in *its ordinary action* to provide by law for submitting to the people the expediency of calling a convention," (Cf. Hoar's "Constitutional Conventions," 64).

The indiscriminate use of the word "revolutionary" is also referred to in the newspaper statement quoted. The words "revolution" and "revolutionary" are used to describe all kinds of things from the French Revolution to changes in the style of dress. For examples of their use in connection with this subject, compare Hoar, pp. 32-33. How little meaning such words have if used to describe steps in the constitutional development of Massachusetts, even including the first steps which were taken during "The Revolutionary War," may be gathered from a brief account of what happened. This story may help us to get our constitution and the position of the various conventions in better perspective.

The last regular General Court held under the Province Charter was dissolved by Governor Gage in June, 1774. County conventions were held during the summer as a result of which delegates were sent to the Continental Congress in Philadelphia and to a Provincial Congress which met at Concord in October. "During the next nine months, Massachusetts was governed by the successive provincial congresses. These were simply revolutionary conventions, state editions of the Continental Congress at Philadelphia. Each town sent as many delegates as it liked. . . . On May 5, 1775, after the Concord fight, it declared General Gage no longer the lawful governor." (Manual of Constitutional Convention, 1917.) On May 16 it addressed a communication to the Continental Congress asking for advice "regarding the taking up and exercising the powers of civil government which we think absolutely necessary for the salvation of our country," (see Journal of Provincial Congress, 230).

On June 9, the Continental Congress adopted a resolution advising that, under the circumstances in Massachusetts,

> "The Governor and Lieutenant Governor are to be considered as absent and their offices vacated and as there is no Council there, and the inconveniences arising from the suspension of the powers of government are intolerable . . . that in order to conform as near as may be, to the substance and spirit of the charter, to be recommended to the Provincial Congress to write letters to the inhabitants of the several places, which are entitled to representation in assembly, requesting them to choose such representatives; and that the assembly and Council should exercise the powers of government, until a governor of his majesty's appoint-

ment will consent to govern the colony according to its charter." (Journals Provincial Congress 359, 741-2).

This advice was followed and on June 20 the Provincial Congress ordered an election of a regular General Court under the Province Charter. The House of Representatives thus elected met at Watertown July 19, 1775, the third Provincial Congress dissolving the same day. Two days later the House elected a council of 28 and the full General Court thus formed resolved that,

> "WHEREAS the late governor, lieutenant governor or deputy governor of the province, have absented themselves and have refused to govern the province according to the charter, the executive power according to said charter, devolves upon the council."

The Province Charter amended by this legal fiction *was the Constitution* of the Colony and State of Massachusetts Bay to October 25, 1780 (see Manual Con. Con. 1917, 12-13).

What may be properly called the purely "revolutionary" period in the state government for the purposes of this discussion, therefore, seems to have ended practically in July, 1775. After that time, while the government was, of course, a *de facto* government, it was nevertheless based professedly upon the plan of the Province Charter, with the exception of the positions of governor and lieutenant governor, after the proposed plan suggested by Congress had been explained to the voters in the different towns, and representatives had been elected by them to serve in accordance with the distribution of such representatives under the charter. In other words, though a defective, temporary arrangement, it was, nevertheless, an *organized ordered* government.

Early in 1776, however, the "Berkshire Constitutionalists" under the lead of Thomas Allen began their activities and presented a memorial that the old charter was dissolved by the war and that the General Court had no right to impose a new constitution or the Province Charter over the people and requested the General Court to frame a constitution "as the basis and groundwork of legislation" and refer it to the people for their approval. In September, 1776, the House requested the towns to vote whether or not they would authorize it to go into convention with the Council to frame a constitution and whether they wished it made public for "inspection and perusal of the inhabitants before the ratification thereof by the assembly." Less than half the towns voted.

At this time, the town of Concord made the earliest suggestion yet discovered in American history of a modern constitutional convention. The General Court did not follow this advice but, in the face of further protests, resolved itself into a convention. In June, 1777, it appointed a committee to draft a constitution. In January, 1778 it again went into convention and in February submitted a document to the people for adoption or rejection. This was rejected by an emphatic vote. Finally, in February, 1779, the General Court adopted a resolve that those qualified to vote for representatives be lawfully warned at the town meetings in May to consider and determine the following questions:

"I. Whether they choose at this time to have a new constitution or frame of government made.

"II. Whether they will empower their representatives for the next year to vote for the calling of a state convention for the sole purpose of forming a new constitution; provided it shall appear to them, on examination, that a major part of the people . . . shall have answered the first question in the affirmative."

(See Journal Convention, Appendix No. 1, p. 189.)

Thereafter in a resolve of June 15, 1779, it was recited that a large majority of the inhabitants of the towns were in favor of a new constitution and that it ought to be formed by a convention specially authorized to meet for that purpose. Accordingly, directions were given for the selection of delegates to such a convention to meet in the following September for the purpose of framing a constitution and to instruct their delegates to transmit a copy of the form of the constitution to the towns for approval or disapproval and:

"It is also recommended to the several towns . . . to instruct their respective representatives to establish the said form of a constitution if, upon a fair examination, it shall appear that it is approved by at least two thirds of those present and entitled to vote."

This resolve was adopted by the House, sent up for concurrence, "read and concurred" in the council, and "consented to by a major part of the council," (see Journal of Convention 5, 6).

The first Massachusetts Convention, therefore, following out the suggestions in the Concord memorial, was the result of separate legislative acts, first, being the question whether a convention should be called by the legislature and, second, after an affirmative vote on that question, a legislative direction for the choice of delegates, the meeting of the convention, etc.

It is noticeable that this separation of the question whether a convention should be called was subsequently embodied in article X of chapter VI of the constitution, which provides specifically that the voters should be asked that question in 1795 and that *if* the vote was in the affirmative then, by the second paragraph, it was provided that a convention should be called.

The purpose of the story recited above in detail is to present with some sense of historical perspective the gradual and orderly development of the idea of a Constitutional Convention in Massachusetts.

The bearing of all this is still clearer when we consider the different meanings of the words "the people," not as used in political harangues, but as used in the constitution itself. In the advisory opinion submitted by the justices at the request of the Senate on April 16, 1917, they said that it was beyond the power of the legislature at that time to provide that "All women entitled to register to vote for school committee shall be regarded as 'people' within the meaning of the sentence in the convention act" (c. 98 of acts of 1916), providing that any "revisions, alterations, or amendments"

adopted by the convention "shall be submitted to the people for their ratification and adoption." The justices pointed out that:

> "The word 'people' may have somewhat varying significations dependent upon the connection in which it is used. In some connections in the Constitution it is confined to citizens and means the same as citizens. It excludes aliens. It includes men, women and children. It comprehends not only the sane, competent, law abiding and educated, but also those who are wholly or in part dependents and charges upon society by reason of immaturity, mental or moral deficiency or lack of the common essentials of education. All these persons are secured by the fundamental guarantees of the Constitution in life, liberty and property and the pursuit of happiness, except as these may be limited for the protection of society. It is declared in the Preamble of our Constitution that 'The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' In this sense 'people' comprises many who, by reason of want of years, of capacity or of the educational requirements of art. 20 of the Amendments of the Constitution, can have no voice in government and who yet are entitled to all the immunities and protection established by the Constitution. 'People' in this aspect is co-extensive with the body politic. But it is obvious that 'people' cannot be used with this broad meaning in a political signification. The 'people' in this connection means that part of the entire body of inhabitants who, under the Constitution are entrusted with the exercise of the sovereign power and the conduct of the government. The 'people' in the Constitution in a practical sense means those who under the existing Constitution possess the right to the elective franchise and who, while that instrument remains in force unchanged, will be the sole organs through which the will of the body politic can be expressed. 'People for political purposes must be considered synonymous with qualified voters. . . . The 'people' who have a right to vote upon any essential aspect of the revision and change, either for members of the convention or the acceptance or rejection of its work, are the people who have a right to vote for State officers and upon State questions, namely, the voters as described by the Constitution itself."

The difference in the meaning of the word "people" thus pointed out, which is clear when one stops to think about it, demonstrates the fact that our representative form of government necessarily includes not only such representatives as the governor and members of the legislature, but that the people themselves in the sense of "qualified voters" are *representatives* of that far larger body which includes as well all the men, women, and children whose rights are protected by the constitution and in trust for whom the qualified voters hold their right to vote. In other words the "voting people" hold their votes in trust for "all the people." *(See Debates Con. Con. 1917, Vol. II, 7, 93, 293.)*

As Mr. Hoar says in the book referred to,

"The people do not vote at a popular election any more than they vote at a session of the legislature. They speak only through representatives in either instance. The people include men, women, and children. In some governmental functions, these people speak through the electors, in other instances, through the legislature, but always through representatives." Further, "The people can speak only through their representatives, the voters, and the voters can speak only at a regular election." And it might be added only on questions legally submitted to them to vote upon.

All this means that when we begin to talk about "the people" in one sense before we know it we are using the words in another sense, and unless we keep the distinction clearly in mind we are apt to find that we are talking nonsense.

Coming now to the comparison of the I. and R. amendment with the original constitution—

There is a provision in the tenth article of the Bill of Rights which is commonly forgotten, but which forms part of the background of our government. It reads,

"The people [obviously here it means *all* the people] of this Commonwealth are not controllable by any other laws, than those to which their *representative constitutional* body have given their consent."

This general provision, while it has been modified to some extent by the I. and R. amendment, cannot be ignored in connection with the reasonable interpretation of that amendment. The fact that the recent convention and the voters retained this clause in the Bill of Rights and inserted the excluding clauses in the I. and R. emphasizes the fact that the representative principle was intended to be preserved in regard to matters relating to the foundations of the government except so far as clearly and specifically modified.

In c. 1, s. 1, art. 3 of the constitution:

"Full power and authority are hereby given and granted to the said General Court from time to time to make, ordain, and establish *all manner* of wholesome and reasonable *orders, laws, statutes and ordinances, directions and instructions,* either with penalties or without; *so as the same be not repugnant or contrary to this constitution;* as *they* shall judge to be for the good and welfare of this Commonwealth, and for the government and order thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof, etc."

These words, many of which go back not only to the Province Charter of 1692, but the Colony Charter of Massachusetts Bay of 1629, describe the general legislative and suggests the general *representative* power of the General Court.

In the definition of the I. and R., it is stated:

"Legislative power shall continue to be vested in the General Court; but the people reserve to themselves the popular initiative,

which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws, enacted by the General Court, to the people for their ratification or rejection."

Then follows the list of excluded matters such as religion, the judiciary, etc., limiting the scope of the initiative and ending with the provisions, "The limitations on the legislative power of the General Court in the constitution shall extend to the legislative power of the people as exercised hereunder." This last clause, of course, is obviously an additional limitation specifically subjecting all proposals under the initiative to the Bill of Rights and to the constitutional principles applicable to the legislature which it is the duty of the court to apply. The clause can in no sense be construed as a grant or enlargement of power.

The paragraph or "Preamble" of the I. and R. which is labeled "Definition" cannot be read independently of the limitations in the paragraphs immediately following. As a matter of fact, the definition adds little, if anything, to the specific language in the paragraphs which follow it. For the most part, it is a rhetorical statement which contains, in the case of the "initiative" in particular, an explanation which attempts to identify a power reserved by "the people" to themselves with "the power of a specified number of voters" to force the submission of certain measures "to the people." This fact and rhetorical language, which is immediately limited by the excluding clauses, call for critical analysis in its interpretation when the great representative principle in the background of government is alleged to be affected.

The use of the word "reserve" in particular when connected with the substance of the amendment requires analysis if the language is to be given any reasonable meaning. It is perfectly obvious, and has been ever since the matter was before the convention, that "the people" of the Commonwealth did not "reserve" to themselves anything whatever by this amendment. What they did do was to separate from the general legislative power of the General Court a limited power. This power over "all the people" was thus separated by the "voting people" and granted to any ten individual citizens and those who supported these with signatures. To this extent, they modified our representative system as it existed previously. This fact was specifically pointed out by "W.M.W." (William M. Warren), one of the closest observers of the sessions of the convention, in an entertaining account which appeared in the *Boston Herald* for November 18, 1917. In discussing the "definition" he said, "Just try to think it through. 'The people reserve to themselves . . . the power of a certain number of voters,'—that is to say, a certain number of voters, not specified, have a power which the people reserve to themselves. See?" (Cf. also, another discussion of the "definition" in the *Herald* for November 29, 1917.)

It is submitted, therefore, that as far as any reservation of power is concerned, nothing of the kind took place. The effect of the I. and R. amendment was necessarily from its nature a strictly limited

grant of power to individuals who while they hold their powers "in trust" theoretically, as they do their votes, yet have no official responsibility, but are subject merely to the sanctions of the criminal law and their own consciences as citizens of the Commonwealth in the use which they may make of the political power thus granted. Considering the nature of such a power and the lack of responsibility involved in its exercise, it is obvious that, as the constitution exists for the protection of the rights of the people as a whole, the exact scope of this power also calls for careful analysis in its interpretation which must not be clouded by vague rhetoric.

Examined from this point of view, it seems clear that the limited power thus granted is very much narrower than the general legislative power and the still broader *representative* power conferred upon the General Court by the original constitution.

The essential point to remember is that an affirmative answer to the question thus asked is a special extra Constitutional authority to the legislature. The General Court is not merely a legislature in the sense of a lawmaking body, but also "the representative constitutional body" described in Art. X of the Bill of Rights above quoted and it is given power by c. 1, sec. 1, art. 3, above quoted, to "make, ordain and establish" not merely "laws" and "statutes" but "orders, ordinances, directions and instructions." The "initiative" as defined in the I. and R. amendment above quoted is the "power of a specified number of voters to submit *constitutional amendments and laws.*" The question and answer form the recognized method of invoking the inherent but extra constitutional powers of the people. Under the constitutional principles of Massachusetts the legislature has no authority to call a convention without asking the "people" for authority to do so and in asking the question it acts not as a lawmaking body but as the only broadly "representative constitutional body" through which the people as a whole can act under orderly legal principles in the exercise of the great powers in the background of our government.

For these reasons the asking of this question is a unique act, fundamentally different from what the justices in the opinion in 6 Cushing referred to as the "ordinary action" of the legislature in its law-making function. The fact that the legislature added to the questions the plans for selecting delegates in the so-called "convention acts" under which the convention of 1820, 1853 and 1917 were held so that the voters pass on the plan as part of the question does not and cannot change the character of the legislative act performed—it simply enlarges the question, informs the voters more fully as to the method to be followed, if they want a convention, and *secures their approval of the method as part of the answer to the essential question.* The fact that all this is done in the convenient *form* of a statute is not decisive. The substance of the thing done is perhaps a "direction or instruction" under c. 1, s. 1, art. 3 above quoted, to those who prepare the ballots as distinguished from a "law" even though it is in the form of a statute. This established practice of submitting the method of choosing delegates as part of the question to be answered by the voters is an eminently fair one in

ment will consent to govern the colony according to its charter." (Journals Provincial Congress 359, 741-2).

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It is noticeable that this separation of the question whether a convention should be called was subsequently embodied in article X of chapter VI of the constitution, which provides specifically that the voters should be asked that question in 1795 and that *if* the vote was in the affirmative then, by the second paragraph, it was provided that a convention should be called.

The purpose of the story recited above in detail is to present with some sense of historical perspective the gradual and orderly development of the idea of a Constitutional Convention in Massachusetts.

The bearing of all this is still clearer when we consider the different meanings of the words "the people," not as used in political harangues, but as used in the constitution itself. In the advisory opinion submitted by the justices at the request of the Senate on April 16, 1917, they said that it was beyond the power of the legislature at that time to provide that "All women entitled to register to vote for school committee shall be regarded as 'people' within the meaning of the sentence in the convention act" (c. 98 of acts of 1916), providing that any "revisions, alterations, or amendments"

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The difference in the meaning of the word "people" thus pointed out, which is clear when one stops to think about it, demonstrates the fact that our representative form of government necessarily includes not only such representatives as the governor and members of the legislature, but that the people themselves in the sense of "qualified voters" are *representatives* of that far larger body which includes as well all the men, women, and children whose rights are protected by the constitution and in trust for whom the qualified voters hold their right to vote. In other words the "voting people" hold their votes in trust for "all the people." *(See Debates Con. Con. 1917, Vol. II, 7, 93, 293.)*

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Coming now to the comparison of the I. and R. amendment with the original constitution—

There is a provision in the tenth article of the Bill of Rights which is commonly forgotten, but which forms part of the background of our government. It reads,

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This general provision, while it has been modified to some extent by the I. and R. amendment, cannot be ignored in connection with the reasonable interpretation of that amendment. The fact that the recent convention and the voters retained this clause in the Bill of Rights and inserted the excluding clauses in the I. and R. emphasizes the fact that the representative principle was intended to be preserved in regard to matters relating to the foundations of the government except so far as clearly and specifically modified.

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"Full power and authority are hereby given and granted to the said General Court from time to time to make, ordain, and establish *all manner* of wholesome and reasonable *orders, laws, statutes and ordinances, directions and instructions,* either with penalties or without; *so as the same be not repugnant or contrary to this constitution;* as *they* shall judge to be for the good and welfare of this Commonwealth, and for the government and order thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof, etc."

These words, many of which go back not only to the Province Charter of 1692, but the Colony Charter of Massachusetts Bay of 1629, describe the general legislative and suggests the general *representative* power of the General Court.

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which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws, enacted by the General Court, to the people for their ratification or rejection."

Then follows the list of excluded matters such as religion, the judiciary, etc., limiting the scope of the initiative and ending with the provisions, "The limitations on the legislative power of the General Court in the constitution shall extend to the legislative power of the people as exercised hereunder." This last clause, of course, is obviously an additional limitation specifically subjecting all proposals under the initiative to the Bill of Rights and to the constitutional principles applicable to the legislature which it is the duty of the court to apply. The clause can in no sense be construed as a grant or enlargement of power.

The paragraph or "Preamble" of the I. and R. which is labeled "Definition" cannot be read independently of the limitations in the paragraphs immediately following. As a matter of fact, the definition adds little, if anything, to the specific language in the paragraphs which follow it. For the most part, it is a rhetorical statement which contains, in the case of the "initiative" in particular, an explanation which attempts to identify a power reserved by "the people" to themselves with "the power of a specified number of voters" to force the submission of certain measures "to the people." This fact and rhetorical language, which is immediately limited by the excluding clauses, call for critical analysis in its interpretation when the great representative principle in the background of government is alleged to be affected.

The use of the word "reserve" in particular when connected with the substance of the amendment requires analysis if the language is to be given any reasonable meaning. It is perfectly obvious, and has been ever since the matter was before the convention, that "the people" of the Commonwealth did not "reserve" to themselves anything whatever by this amendment. What they did do was to separate from the general legislative power of the General Court a limited power. This power over "all the people" was thus separated by the "voting people" and granted to any ten individual citizens and those who supported these with signatures. To this extent, they modified our representative system as it existed previously. This fact was specifically pointed out by "W.M.W." (William M. Warren), one of the closest observers of the sessions of the convention, in an entertaining account which appeared in the *Boston Herald* for November 18, 1917. In discussing the "definition" he said, "Just try to think it through. 'The people reserve to themselves . . . the power of a certain number of voters,'—that is to say, a certain number of voters, not specified, have a power which the people reserve to themselves. See?" (Cf. also, another discussion of the "definition" in the *Herald* for November 29, 1917.)

It is submitted, therefore, that as far as any reservation of power is concerned, nothing of the kind took place. The effect of the I. and R. amendment was necessarily from its nature a strictly limited

grant of power to individuals who while they hold their powers "in trust" theoretically, as they do their votes, yet have no official responsibility, but are subject merely to the sanctions of the criminal law and their own consciences as citizens of the Commonwealth in the use which they may make of the political power thus granted. Considering the nature of such a power and the lack of responsibility involved in its exercise, it is obvious that, as the constitution exists for the protection of the rights of the people as a whole, the exact scope of this power also calls for careful analysis in its interpretation which must not be clouded by vague rhetoric.

Examined from this point of view, it seems clear that the limited power thus granted is very much narrower than the general legislative power and the still broader *representative* power conferred upon the General Court by the original constitution.

The essential point to remember is that an affirmative answer to the question thus asked is a special extra Constitutional authority to the legislature. The General Court is not merely a legislature in the sense of a lawmaking body, but also "the representative constitutional body" described in Art. X of the Bill of Rights above quoted and it is given power by c. 1, sec. 1, art. 3, above quoted, to "make, ordain and establish" not merely "laws" and "statutes" but "orders, ordinances, directions and instructions." The "initiative" as defined in the I. and R. amendment above quoted is the "power of a specified number of voters to submit *constitutional amendments and laws.*" The question and answer form the recognized method of invoking the inherent but extra constitutional powers of the people. Under the constitutional principles of Massachusetts the legislature has no authority to call a convention without asking the "people" for authority to do so and in asking the question it acts not as a lawmaking body but as the only broadly "representative constitutional body" through which the people as a whole can act under orderly legal principles in the exercise of the great powers in the background of our government.

For these reasons the asking of this question is a unique act, fundamentally different from what the justices in the opinion in 6 Cushing referred to as the "ordinary action" of the legislature in its law-making function. The fact that the legislature added to the questions the plans for selecting delegates in the so-called "convention acts" under which the convention of 1820, 1853 and 1917 were held so that the voters pass on the plan as part of the question does not and cannot change the character of the legislative act performed—it simply enlarges the question, informs the voters more fully as to the method to be followed, if they want a convention, and *secures their approval of the method as part of the answer to the essential question.* The fact that all this is done in the convenient *form* of a statute is not decisive. The substance of the thing done is perhaps a "direction or instruction" under c. 1, s. 1, art. 3 above quoted, to those who prepare the ballots as distinguished from a "law" even though it is in the form of a statute. This established practice of submitting the method of choosing delegates as part of the question to be answered by the voters is an eminently fair one in

accordance with Massachusetts principles, but it does not change the character of the representative act or make it any less unique.

While the acts under which the conventions in 1820, 1853, and 1917 were called were submitted to the governor for his approval, it may be open to question whether such approval is necessary (c. f. Hoar "Constitutional Conventions" c. VII and Mass. Const. c. 1, §1, Art. III). But, whether or not that is so, the powers invoked in submitting a convention act for popular vote have to do as already pointed out with what the justices in the advisory opinion in 1833, already mentioned, referred to as "natural rights and the inherent and fundamental principles upon which civil society is founded rather than any question upon the nature, construction, and operation of the existing Constitution of the Commonwealth and the laws made under it." (See also 226 Mass. 610.)

As a proper method of invoking such natural or extra constitutional powers, this method above described and followed since 1778, is expressly recognized in Article X of C. VI of the frame of government, in which the General Court was specifically directed by the constitution to order the qualified voters in their respective towns and plantations "to convene for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution."

It is one of the curious facts in the history of the recent convention that the committee on the so-called "Rearrangement" considered this provision so "obsolete through expiration" as to call for its omission from the constitution. This omission, among other "substantive" changes, was, it is submitted, one of the glaring defects of the "rearrangement" because, while the date of 1795 and the method of convening the voters for such a purpose as specified may be considered "obsolete through expiration," the express recognition of the principle of a constitutional convention called by the "people," after the "people," speaking through their representatives in the General Court, have submitted the question of calling such a convention to the voters, is not at all obsolete, but underlies every constitutional convention held in Massachusetts since 1780.

The Bearing of the Attorney General's Opinion on the "Rearrangement."

The May number of the QUARTERLY contained the opinion of the Attorney General that the resubmission to the voters of the "Rearrangement" was beyond the power of the General Court, because it was a whole constitution and the General Court could submit only *amendments*. Now just as the legislature cannot undertake the broad powers of a constitutional convention, so ten citizens cannot attempt, by means of the strictly limited grant of power in the I. and R., to exercise the broad *representative* powers of the legislature, as distinguished from the mere lawmaking power, in asking the question whether a convention shall be called which necessarily involves excluded matters. As already suggested, "such a joker" in regard to our fundamental rights with such unlimited opportunities for "collective log-rolling" on a vast scale, would be of too serious a nature to be charged to the recent convention in the light

of its history and debates from which the practical and illuminating remarks of Mr. Creed have been quoted. I submit that such a petition even if circulated, signed and filed with the Secretary of the Commonwealth would have no legal effect whatever, that he would be under no duty to transmit it to the House, and if he did transmit it, the House would be under no duty to consider it or vote on it and that the question could not be forced on to the ballot. If such a petition should again be filed, perhaps, on reconsideration of the whole subject, the Attorney General might think the matter sufficiently clear to refuse a certificate that the "measure" petitioned for "is in proper form for submission to the people . . . and that it contains only subjects not excluded from the popular initiative," and thus avoid the misunderstanding which might result from its circulation.

F. W. GRINNELL

"THEY DON'T KNOW WHAT IS IN IT."
(Reproduced by permission of the New York Times.)

APATHY
THE INFLUENCE OF BOREDOM ON HISTORY AND GOVERNMENT

A few years ago we happened on a reference to a remark by the late Dean Inge on the relation between "boredom" and history. Intrigued, we looked for it in a library and found it in an essay on "escapism" in his volume of essays entitled "The End of an Era" as follows:

> "Neither individuals nor societies are content, for long. Most of us, though we are bidden to look forward to an eternity of calm fruition, cannot spend an evening without trying to escape from a gentleman whom we know slightly and find, it seems, an intolerable bore—ourselves. There are various expedients—crossword puzzles, detective novels, daydreaming, aimless chatter, card-playing, alcohol, or other drugs.
>
> "The effect of boredom on a large scale in history is underestimated. It is a main cause of revolutions, and would soon bring to an end all the static Utopias and the frameyard civilization of the Fabians. Boredom often generates wars."

This quotation reminded us of two cartoons reprinted in the "Quarterly" by permission, many years ago. As the quotation and the cartoons seem to reflect dramatically our own observation and experience with many citizens, lawyers among them including our-

selves sometimes, at elections when a ballot contains the names of candidates for some office whom we never heard of and referendum questions which have not been "thought through" by busy or uninformed people, we submit them on this and the previous page to our readers and ask them to think about their own experience and observations, not only of themselves, but of their friends and many of their fellow citizens. They seem to us to have a direct bearing on the currently discussed proposals for a Constitutional Convention as well as other public problems discussed in this issue.

F. W. G.

WHY THEY CALL OURS A "SELF-GOVERNMENT"?

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THE HISTORIC RIDE OF CAESAR RODNEY— THE NEEDED VOTER FOR THE DECLARATION OF INDEPENDENCE

(Reprinted by permission from "This Week" Magazine Copyright 1960 by the United Newspapers Magazine Corporation and also with the permission of Mr. Lester David and Mr. Clifton Fadiman.)

FOREWORD

Why do we reprint this story in the "Quarterly"? For two reasons—first, because we find it a hitherto unknown and thrilling story for those Americans who are not too cynical or too "bored" to be thrilled by American history and second, because it was the climax of the story of the great Declaration—the prelude to our constitutional government as a republic of free people, and Henry W. Longfellow did not write a poem about Caesar Rodney as he did about Paul Revere. In these days of loose, and frequently uninformed, constitutional thinking, the balanced thrill of our dedicated "Founders" and builders is still important for us.

The "Massachusetts Heritage" pamphlet issued in 1954, for distribution to the Massachusetts high school students, began with the words "John Adams is part of you" as a citizen of Massachusetts and of the United States. Why?

He was not only the draftsman of the Massachusetts constitution of 1780, but the statesman and orator of the Revolution who carried Jefferson's Declaration of Independence through the Continental Congress in 1776 with the final help of Caesar Rodney.

F. W. G.

CAESAR RODNEY (1728-1784)

OLD INDEPENDENCE HALL IN 1776

CAESAR RODNEY AND HIS HEROIC RIDE

Introduction by Clifford Fadiman

Perhaps some of my readers will spend Independence Day in Washington. You might find yourself visiting the National Archives Exhibition Hall, reflecting on how it all started, as you examine the document of the Declaration of Independence. Look at the list of signers. In the fourth column, third line from the bottom, you will make out a name: Caesar Rodney. Behind that signature lies a suspense-packed true story of the Revolution's other rider.

The facts of that story were recently unearthed by reporter Lester David. He obtained much of his information from Federal Judge Richard S. Rodney, a descendant of the uncle of the man whose ride, as you will see, may now be added to those of Paul Revere and General Phil Sheridan, who rallied his beaten army after galloping from "Winchester twenty miles away."

Judge Rodney's home in New Castle, Del., is on the route of Caesar Rodney's dramatic journey. On one wall is a military commission signed by Washington. Scattered about is furniture that once formed part of the Dover farmhouse from which Judge Rodney's ancestor started out on the dark early morning of July 2, 1776.

Today you can travel by car from Dover to Philadelphia, virtually following Rodney's route, in just under two hours. It took Rodney 11 hours to gallop and splash his way up to the front door of the State House in Philadelphia—and make history.

This little-known chapter in the national annals is not only worth reading. It is worth remembering.

Clifton Fadiman

It was July 2. The Continental Congress was about to vote for independence. One delegate was missing. But 80 miles away, he was starting a race for liberty.

By LESTER DAVID

A dust-caked messenger drew rein at "Poplar Grove," Caesar Rodney's rambling farmhouse on the outskirts of Dover in the colony of Delaware. It was almost two in the morning of July 2, 1776, and the house was quiet and dark as the starless night.

Moments later lights flickered and Rodney himself—farmer, militia commander and delegate to the Continental Congress—turned the huge lock with its five-inch key and swung open the door.

The rider spoke: "I have an urgent message for Caesar Rodney."

"I am Rodney," said the man at the door. "What is it?" The messenger fumbled in his pouch and pulled out a letter. Rodney read quickly, then drew in his breath.

He was needed in Philadelphia at once. Congress, in session there, was preparing to vote on the question of independence, perhaps before this very day ended. And because of a division of opinion between his two fellow Delaware delegates, Rodney's vote was indispensable.

Rodney was stunned. He had not remained in Philadelphia as the other delegates had. News had reached him that loyalists were raising men and arms in Delaware to fight on England's side. And as

head of the Delaware militia, he had rushed back home. He had thought he could quell the uprising and be back in Philadelphia in plenty of time.

But the question of independence was coming up sooner than he had expected, much sooner. He had to be there that day.

Turning, he thanked the messenger and snapped a command to a servant: "Saddle the brown. I'm leaving now." The man dashed past him and out the door. Rodney ran upstairs to dress, while the tired messenger set out for a bed at the tavern.

Less than ten minutes later, Rodney was striding to the stable, his candle-lantern cutting a glow into the blackness. He wore spurs and riding boots, heavy knee breeches and a waistcoat over a white, collarless shirt. His black cocked hat was pulled low over his small head and he carried a riding crop. Around his disease-ravaged face —he had an ulceration diagnosed as cancer that wouldn't heal—he had knotted a dark green cloth.

His mount was ready, a big-boned stallion with proven courage and endurance. The delegate from Delaware swung himself into the saddle and wheeled toward the road. There he paused and looked at the sky. It was black and the wind was southerly. A heavy rain would make the roads almost impassable. Already they were muddy from earlier rains.

Those roads northward toward Philadelphia were narrow, winding and pocked with holes where one false step could send a horse and man hurtling. There were unbridged streams to ford and dangerous quagmires where horses could founder in black mud up to their bellies.

Caesar Rodney leaned forward, lightly touched spurs to flanks and whispered, "Go." The big horse leaped forward. Rodney began riding through the night to Philadelphia, 80 miles away. . . .

The day before, July 1, the gavel had banged for order in the Continental Congress shortly after 9 a.m. Slender, beak-nosed Thomas McKean of Delaware sat frustrated and gloomy. McKean, like Caesar Rodney, was heart and soul for independence. But George Read, Delaware's third delegate, was implacably opposed. With Rodney at home, Delaware's vote could not be cast for liberty —and a unanimous vote was essential.

Leaders backing the independence resolution were sure of nine of the 13 colonies. Two of the remaining four, South Carolina and Pennsylvania, were swinging over. New York's delegation was awaiting instructions from home which were virtually certain to be favorable. That left only Delaware. And even one colony refusing to indorse independence would seriously weaken the patriot cause.

Suddenly McKean rose, left the hall and crossed the State House yard. He hurried down Walnut Street to the express-rider station.

"How soon can a rider reach Dover?" he asked.

"In twelve hours, if there's no rain."

"Then send a rider with this message—and tell him in God's name to hurry!"

Would Rodney arrive in time? Rodney didn't know himself. Ten

miles of hard riding from the farm brought him to the two forks of Little Duck Creek, each of which cut across the road, neither of which had a bridge. At each, he eased the stallion into the water and, with practiced hands and knees born of years in the saddle, guided him expertly to the other side. Then he plunged into the scrub forest which stretched for the next ten miles.

Suddenly, nearing a bend, the stallion stumbled. Rodney pitched forward and nearly fell. But the horse regained his footing and the rider kept his seat. He urged his mount on, leaning low over his neck to whisper quiet, encouraging words.

After the forested area, the road widened. When the first glimmerings of daylight came, Rodney was approaching Cantwell's Bridge at Appoquinimink River. He had allowed his horse only brief rests and himself only occasional pulls from the West India rum he carried. Now, he reined in at a wayside inn.

He knocked loudly and roused the sleeping keeper. "My apologies for waking you," Rodney said. Then, nodding toward his horse, "Could you provide us with a breakfast?"

It was six in the morning and he had come 25 miles. The day was dawning cloudy and close. Rodney didn't tarry.

At nine that morning, most of the delegates were in their seats at the State House for the final vote.

By now every man knew the farmer from Delaware had been sent for but nobody was certain when he would arrive—or if he would. Stocky John Adams of Massachusetts, whose red-rimmed eyes and shaky hands revealed all too plainly that he was on the point of exhaustion from his heroic efforts of the past few months, held a whispered conference with young Thomas Jefferson of Virginia. The sandy-haired, brilliant Jefferson, only 33, had finished his draft of the Declaration of Independence and it lay at that moment on the table before the presiding officer. Discussion of the Declaration was the next order of business, following the vote on the resolution.

Adams looked up, caught Colonel McKean's eye and waved him over. He asked: "Will he come in time?"

"Look at the sky," McKean said.

Caesar Rodney was looking at the sky also. Blackness told him he must hurry. There were 30 miles to go.

After breakfasting quickly, he had entered upon the lonely, rolling hills of St. Georges. At 8 a.m., he had stopped to water his horse at the Red Lion, a crossroads tavern.

For the next stretch, the road was excellent, and the rain still held off. Rodney galloped at full speed for whole stretches; by nine o'clock he was clattering over the cobbles of New Castle, past its lovely greens and tall-spired churches, with Chester 20 miles off.

There he knew his friend William Kerlin, host of the Pennsylvania Arms Tavern, could provide him with a fresh horse. The big stallion was faltering.

And then the heavens opened, and in less than a minute, Rodney was soaked and the road was sliding, oozing mud. The weary stallion staggered and slowed but Rodney, crouching low, dug in his spurs.

The lightning flashed. Behind him a tree exploded with a loud

report. A wind gust now tore away the green cloth covering Rodney's face and the rain drove shafts of pain into the open sore. But he rode on, through the thunder and rain, into the bustling port town of Wilmington.

Toward 11, he clattered over a crude bridge across Chester Creek and pulled up wearily at the Pennsylvania Arms. His good friend Kerlin rushed out, looked with astonishment at the mud-splashed rider and exclaimed: "By God, you must have ridden all night!"

For reply, Rodney said, "I must go on—let me take a fresh horse, William, your stoutest and fastest. And have this brave fellow cared for." He himself would eat and rest while the second horse was made ready. And he would appreciate some dry clothing.

Not long after, Rodney mounted again and was on his way. Philadelphia was still 15 miles to the northeast.

At the State House, the vote still had not come.

At noon, the Congress recessed for lunch, and the delegates scuttled through the rain to eat at nearby taverns and private homes. Voting on the resolution would be the first order of business at the afternoon session.

One hour to go, and Rodney hadn't appeared.

At one o'clock, the first of the delegates returned. In ten minutes, the room was half-filled. Five minutes later, the door to the chamber was closed. Benjamin Harrison of Virginia, as chairman of the Committee of the Whole, was presiding. He banged his gavel.

McKean was still outside, waiting at the State House door.

Then the sound came—hoofbeats on the cobblestones of Walnut Street, on the other side of the wall. Mud-spattered and rain-soaked, Rodney rode into the yard.

A great surge of relief and gladness went through McKean as Caesar Rodney climbed from his mount and walked to the plain front doorway.

McKean tried to speak, but no words would come other than a brief, "Thank God you're here," as he extended a hand. The two men walked arm in arm to the meeting room.

The delegates turned and looked as Rodney sank wearily into his seat. Many waved—Jefferson smiled, old Benjamin Franklin, now 70, beamed; tired John Adams threw him a grateful glance.

The voting began. Balloting was in geographical order, northern colonies called first, each delegate polled individually.

New Hampshire, Massachusetts Bay, Rhode Island—all voted aye. (New York abstained temporarily while waiting for final instructions, but there was no doubt that the State would vote yes. Approval came soon after.) Connecticut, New Jersey, Pennsylvania also thundered "ayes." And then Delaware was called. McKean, "aye." Read, a firm "nay." Rodney?

He stood, riding crop still in his hand, boots and spurs still on his feet and mud on his clothes, and spoke in loud, clear tones: "As I believe the voice of my constituents and of all sensible and honest men is in favor of independence, my own judgment concurs with them. I vote for independence."

The great resolution had been carried without a dissenting State. And the colonies were united as one before the whole world.

CURRENT DEROGATORY WORDS ABOUT HISTORIC DOCUMENTS
and by contrast
SOME WORDS OF CHARLES WARREN AND RUFUS CHOATE
about
THE WORK OF JOHN ADAMS, CAESAR RODNEY AND THE OTHER "SIGNERS" OF THE DECLARATION

We have heard, or read, in recent months, many words, which can hardly be described as appreciative applied to our fundamental constitutional documents—the work of our dedicated "Founding Fathers" and some of their dedicated successors. For instance, within a few days, the constitution of the United States was called "archaic" and, as pointed out in the "Quarterly" for April, 1960 (p. 3) our Massachusetts constitution has been described as "a garbage can," an "old family bus" and "a one horse shay" government. While we indulge in "free speech" ourselves, we have always considered that there should be some reasonable balance in words used in public discussion lest our listening, or reading, citizens be misled into the mistaken notion that the 18th and early 19th century thinkers are a bunch of "mossbacks" or "museum waxworks" instead of great suggestive guides in the development of American thinking.

Accordingly, in connection with the story of Caesar Rodney and the great Declaration which, so far as I have observed, has not yet been classified by modern public speakers as entirely "old hat," perhaps a few balancing appreciative words of informed men may be timely.

F. W. G.

CHARLES WARREN

In 1927, Hon. Charles Warren, of Massachusetts, the distinguished historian of the Supreme Court of the United States, delivered an address at George Washington University on "John Adams and American Constitutions." He began his address as follows . . . "It is the distinction of great leaders that they are the first to feel the movement of an age, recognize its significance, and give it direction. Hence it is that he who wishes to understand the fundamentals of his government must keep himself familiar with the lives of its founders.

At the present time, the tendency among writers seems to be, not so much to praise famous men as to minimize their greatness and to emphasize their commonness.

Formerly the life of a great man was held up as a model and an incentive. Now, under the plea of "humanizing" his subject, the biographer aims, apparently, not so much to bring us up to his level, as to bring him down to ours. Yet, as Robert Louis Stevenson has said in his essay on the "English Admirals": "It is, at best, but a pettifogging, pickthank business to decompose actions into little personal motives and explain heroism away." And he who tarnishes the glory of high public service and who beclouds the light of patriotic ideals, by harping on the minor traits and defects of great Americans, does a sad disservice to his country; for the glory of a country's past should be an illuminating inspiration to the citizens of the future.

In reaction against this style of treatment, it is good for us to turn our attention away from the small things which a great man shares in common with little men, and to consider some of the things which made him great.

The Adams whom I wish to call to your mind is not the figure which party foes and Hamiltonian historians have misportrayed as simply a vain, pompous, formal, irritable, envious fighter—but rather the man of whom Jefferson wrote that he was "as disinterested as the being who made him," that "his deep conceptions and undaunted firmness made him truly our bulwark in debate," and that "to him more than to any other man is the country indebted for our independence."

RUFUS CHOATE

In 1857, Rufus Choate, in an address before the Mechanics Apprentices Library Association on "The Eloquence of Revolutionary Periods," gave what is, perhaps, the most vivid recorded description of the position of John Adams in America during the winter and spring of 1776. He said, "Men heard that eloquence in 1776, in that manifold and mighty appeal by the genius and wisdom of that new America, to persuade the people to take on the name of nation, and begin its life . . . the leader in that great argument was John Adams, of Massachusetts. He, by concession of all men, was the orator of that revolution—the revolution in which a nation was born. Other and renowned names, by written or spoken eloquence, cooperated effectively. John Adams' eloquence alone seemed to have met every demand of the time; as a question of right, as a question of prudence, as a question of conscience, as a question of historical and durable and innocent glory, he knew it all, through and through; and in the mighty debate, which, beginning in Congress as far back as March or February, 1776, had its close on the second and on the fourth of July, he presented it in all its aspects, to every passion and affection, . . . he presented the appeal for months, day after day, until, on the third of July, 1776, he could record the result, writing thus to his wife: 'Yesterday the greatest question was decided which was ever debated in America.' Of that series of spoken eloquence all is perished; not one reported sentence has come down to us. The voice through which the rising spirit of a young nation sounded out its dream of life is hushed. The great spokesman, of an age unto an age, is dead. And yet, of those lost words, is not our whole America one immortal record and reporter?"

Choate said something, especially in that last sentence.

Readers who have not browsed for plums in the utterances of orators may find the following comments, which appeared in the American Law Review in 1882, not only entertaining, but enlightening as to the causes of change in oratorical style.

"The future Websters and Choates will use fewer words, . . . If those wonderful men were of our present time, they would still persuade us and overcome us, but it would be with less of a flourish. . . .

"In the days when the chief reading was English literature the Latin and Greek classics, the Bible, the constitution, and pamphlets

on political parties of the United States, it was not only comparatively easy for an orator to know what his audience would respond to, but it was sure that if they listened at all, they would at least admire a familiarity with those fields of learning which were not only admitted, but claimed on all sides, to be the Elysian fields of a happy intellectual life. Such reading also was directly stimulating to the ready and graceful utterance of ideas in the midst of abounding sentiment."

To get the full force of Choate's eloquence one needs some knowledge of Choate himself and his own "abounding sentiment" with which he inspired his audiences. It was not mere sentiment. It was the informed sentiment of people who helped to make the constitution work in practice who really thought about their government in a way that seems less common about "big" government today.

In spite of the absurd political extravagance of talk of many during what Roscoe Pound has referred to as "the Jefferson Brick Era of American politics"* there were enough reasonably balanced American enthusiasts so that no "economic" historian, or modern materialist, can write out of American history or belittle, the genuine emotional element as a powerful force in the growth of Massachusetts and of the Nation. It was the deep force which carried Caesar Rodney on his heroic ride to join John Adams and the other "signers" on July 2nd, 1776 and made our later unique constitutional government possible.

F. W. G.

* Readers of Martin Chuzzlewit will recognize the reference. We suggest the reading of "The Wizard of the Law" by Claude Fuess or more briefly the review of it in the "Quarterly" for May, 1928 (pages 97-105) for an account of Choate.

"CONTINUITY OF THE JUDICIARY AND CONTINUED OPERATION OF THE JUDICIAL SYSTEM IN EVENT OF ENEMY ATTACK"

Request for Suggestions

Among the matters referred this year by the legislature to the Judicial Council with request for reports we think the following resolve should be called to the attention of the bench and bar in advance so that anyone who may have suggestions to submit for consideration of the Council will have an opportunity to do so. We reprint the Resolve with references to some related material.

F. W. G.

HOUSE—No. 3010

"RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL RELATIVE TO PROVIDING FOR CONTINUITY OF THE JUDICIAL SYSTEM IN EVENT OF ENEMY ATTACK.

"*Resolved*, That the judicial council be requested to investigate the judicial system of the commonwealth for the purpose of determining measures necessary to provide for continuity of the judicial branch of the government and the continued operation of the ju-

dicial system in event of enemy attack upon or affecting the commonwealth, and to include its conclusions and its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year."

The Columbia Law Review for February, 1955, contains an article by Prof. David F. Cavers (a present member of the Federal Commission on "Legal Planning Against the Risk of Atomic Wars"). Prof. Charles Fairman delivered a paper on "Government Under Law in Time of Crisis" at the Marshall Bicentennial Conference in 1955. California has acted.

A constitutional amendment and various bills were filed in the Massachusetts legislature the passage of which was recommended by the committee on constitutional law but no action was taken.

THE CONSTITUTIONAL AMENDMENT

(Proposed but not acted on)

HOUSE—No. 1260

By Mr. Nazzaro of Boston (by request), petition of John J. Devlin for a legislative amendment to the Constitution to provide for the continuity of government in periods of emergency resulting from disaster caused by enemy attack. Constitutional Law.

PROPOSAL FOR A LEGISLATIVE AMENDMENT TO THE CONSTITUTION AUTHORIZING THE GENERAL COURT TO ENACT LEGISLATION TO PROVIDE FOR CONTINUITY OF GOVERNMENT.

A majority of all the members elected to the Senate and House of Representatives, in joint session, hereby declares it to be expedient to alter the Constitution by the adoption of the following Article of Amendment, to the end that it may become a part of the Constitution [if similarly agreed to in a joint session of the next General Court and approved by the people at the state election next following]:

ARTICLE OF AMENDMENT.

The General Court, in order to insure continuity of the government of the commonwealth and the governments of its political subdivisions in periods of emergency resulting from disaster caused by enemy attack, shall have full power and authority to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and to adopt such other measures as may be necessary and proper for insuring continuity of the government of the commonwealth and the governments of its political subdivisions. In the exercise of the powers hereby conferred the general court shall in all respects conform to the requirements of this constitution except to the extent in the judgment of the legislature so to do would be impracticable or would result in

undue delay. Nothing contained herein shall authorize any measure infringing upon the rights secured to the people by Articles I to XXX, inclusive, of Part the First of the Constitution of the Commonwealth.

This should be closely checked with Article IV of Section 1 of Chapter 1 of the "Frame of Government" defining the present "Legislative Power" adopted in 1780.

In addition to the reference to the Judicial Council, already quoted, as to the judiciary, a special commission was provided for by Resolves Chapter 55.

RESOLVE PROVIDING FOR AN INVESTIGATION AND STUDY BY A SPECIAL COMMISSION RELATIVE TO THE CONTINUATION OF STATE AND LOCAL GOVERNMENT IN THE EVENT OF ATOMIC ATTACK.

Resolved, That an unpaid special commission, consisting of two members of the senate, to be designated by the president thereof, three members of the house of representatives, to be designated by the speaker thereof, the attorney general or his nominee, the commissioner of administration or his nominee, the director of civil defense or his nominee, and five persons to be appointed by the governor, is hereby established for the purpose of making an investigation and study of the continuation of state and local government, including legislative, executive and judicial functions, in the event of atomic attack. Said commission shall, in the course of its investigation and study, consider the subject matter of current house document numbered 1499, relative to authorizing the designation of additional, alternate department heads in event of atomic attack, of the investigation and study proposed by current house document numbered 1500, relative to continuity of the government of the political subdivisions of the commonwealth in event of enemy attack, of current house document numbered 1501, relative to authorizing temporary appointments to fill vacancies in certain offices caused by enemy attack, of current house document numbered 1502, relative to authorizing removal of certain officers in emergencies resulting from enemy attack, of current house document numbered 1503, relative to authorizing the relocation of the executive department in event of enemy attack, and of current house document numbered 2538, relative to placing the civil defense office in the military department. Said commission shall be provided with quarters in the state house or elsewhere, may hold hearings, may travel within and without the commonwealth and may expend for expert, legal, clerical and other services and expenses such sums as may be appropriated therefor. Said commission shall report to the general court the results of its investigation and study and its recommendations, if any, together with drafts of legislation necessary to carry its recommendations into effect, by filing the same with the clerk of the house of representatives on or before the fourth Wednesday of January, nineteen hundred and sixty-one; provided, however, that said commission may, if feasible, make

interim reports to the general court with recommendations and legislation necessary to carry its recommendations into effect, by filing the same with the clerk of the house of representatives, for consideration at the current session of the general court.

THE ANTICIPATORY BILL AS TO DELEGATED AGENCY AND FIDUCIARY POWERS

(Recommended by the Judicial Council in 1958)

The text of this bill will be found in the 34th report of the Council (reprinted in the "Quarterly" for December 1958-January 1959, p. 59). The Council said:

"This bill is a slightly revised form of a similar bill submitted to the legislature in 1957. The reason and purpose of the bill was explained in detail in a statement reprinted for convenient reference in Appendix F of this report. The purpose of anticipating a possible atomic emergency in which the principal of a business or his agents in carrying on business or a fiduciary is killed so that under the present law the agency is terminated by the death of the principal and no one is left with authority to carry on or protect the business or the property of a fiduciary and providing so far as legally possible against the ruin or serious loss involved seems an obviously desirable purpose. The problem is as to the workable mechanics of a safe-guarding law.

"We have studied the bill and believe it, with slight amendments, to be workable and practical and within the law. We, therefore, recommend it."

Appendix F to the report contained the following article which we reprint for the convenience of our readers in considering the subject.

THE ARTICLE

By

JAMES W. PERKINS AND LIVINGSTON HALL

[A redraft of an article originally appearing in the MASSACHUSETTS LAW QUARTERLY, March 1957.]

Introduction

Though we hope devoutly that an atomic attack may never be launched against this country, the chance that it will be is not so remote that we can afford to disregard it. Advance planning by private citizens could reduce the hardship and confusion that an attack would cause. House, No. 1987 of 1958 was drafted to facilitate such planning.

The problem of civil defense against atomic attack can be divided into three portions: (1) evacuation and shelter from blast, heat and radiation; (2) the furnishing of food, clothing and housing to refugees on a temporary emergency basis; and (3) the re-

vival of business so that the survivors can continue to obtain necessary goods and services.

House, No. 1987 concerns the third portion, the revival of business. We could make no special provision for this and wait for the government to recreate the nation's business. But we believe that it would be much faster and more effective and more in keeping with our American traditions to make maximum use of individual initiative in the resuscitation of economic life.

In order to provide individual incentive and responsibility for the revival of trade and industry, an earlier 1957 bill (Senate, No. 309) was drafted to set up machinery whereby agents could carry on the business affairs of persons killed, incapacitated or missing as the result of atomic attack. The 1958 act has been drawn to cover other fiduciaries as well as agents. It would add new Sections 7-14 to G. L. Chapter 104.

The Agency Rule that normal agency powers automatically terminate without notice upon death of the principal has been termed "shockingly inequitable" by Professor Seavey, see The Rationale of Agency, 1920, 29 Yale L. J. 859 at 893. It has been modified as to partnerships in the Uniform Partnership Law, and has been changed as to all agents in at least one state, see Wisconsin Laws 1943, Chapter 49. Limited relief from the harsh effects of this rule was given during World War II by statutes enacted in a dozen states providing that servicemen's powers of attorney should terminate only upon notice of death.

James W. Perkins, a Boston attorney, first called attention to the need of statutory modification of this Agency Rule in Massachusetts in the event of an atomic attack against the United States. In September 1956, he wrote to enlist the support of Associate Dean Cavers of the Harvard Law School, who was a member of the American Bar Association's Special Committee on the Impact of Atomic Attack on Legal and Administrative Processes. During the next few months Perkins drafted Senate, No. 309, with the collaboration of Associate Dean Cavers, Vice Dean Hall, Professor Herwitz and Robert P. Moncreiff, 3L, of the Harvard Law School. In 1957 a separate act was prepared by a drafting group at Harvard Law School covering the administration of trusts in time of atomic emergency. The two acts were then merged and expanded to cover guardians, conservators, executors and administrators and the 1958 act is the result of these labors.

Admittedly this bill covers only a small part of the over-all problem. It does not cover individuals who have no agents or other fiduciaries and appoint none under Section 9. The affairs of such individuals, if they are killed, incapacitated or missing, may have to be administered by a system of public authority. But it does meet a part of the over-all problem satisfactorily, and it contains no provision which should be controversial. We believe that it is better to make a small start which fully covers a part of the problem than to make no start at all. If a bill like this can be passed, we hope it will create interest in going on to a full preparation against atomic attack throughout the rest of the country, as well as in Massachusetts.

1. *What are the Background, Purposes and Content of the Draft Act?*

The Agency Rule as expressed in technical terms is as follows: "The death of, or loss of capacity by, a principal terminates his agents' authority and apparent authority without notice." (Restatement of Agency, ss. 120, 122, 133.) (The same would be presumably true as to the powers of a guardian or conservator upon the ward's death or of the agent of any fiduciary upon the fiduciary's death.)

The intent and purpose of the Rule are simple. The Rule exists to project the interests of the family and creditors of a deceased principal by giving sole power to bind his estate to his executor or administrator, who act subject to the control of the Probate Court. But undesirable applications on the Rule have developed. These would have paralyzing effects in the event of an atomic emergency. The following are examples, together with the cure provided by this Draft Act:

Case (a): Communications with the area in which the principal is living are cut off as a result of enemy action during a period of atomic emergency and an undetermined number of the inhabitants are killed. Agents have important interests of the principal committed to their charge, to protect which immediate action is required. But they cannot act safely, even though it should later turn out that the principal had not been harmed. The reason is that both the agents and the third persons with whom they might wish to deal could not act legally if it turned out that the principal was already dead, even though there was no way in which they could have had notice of his death at the time.

The Cure: Section 8 (added to G. L. Chapter 104 by Section 1 of the Draft Act) provides that under such circumstances any authority previously given by the principal to his agents "shall continue regardless of the death or loss of capacity . . . of any . . . principal." Thus both agent and third person would be protected whether the principal is in fact dead or not. Section 8 would similarly continue the powers of guardians and conservators.

Case (b): An agent in charge of a business learns that his principal has been killed during a period of atomic emergency, and that as a result of the emergency the Probate Courts are closed for an indefinite period. There is no way in which the agent can legally continue to operate the business, no matter how important it may be to the community, until the Probate Courts have reopened and an executor or administrator has been appointed.

The Cure: Section 10 (added to G. L. Chapter 104 by Section 1 of the Draft Act) provides for continuation of such an agent's power to bind his principal until "knowledge of the appointment . . . of any . . . personal representative qualified and able to exercise the powers involved" comes to the agent or third person, as the case may be.

Case (c): The principal and all his agents are killed during a period of atomic emergency. There is no way under present law by which the principal can designate other persons to carry on his affairs until the Probate Courts can be re-opened and appoint an executor or administrator to handle his estate.

The Cure: Section 9 (added to G. L. Chapter 104 by Section 1 of the Draft Act) empowers a principal by a power of attorney to authorize another to act "as his agent, during a period of atomic emergency . . . regardless of the death or loss of capacity." Section 9 would also permit trustees and other fiduciaries to make similar emergency arrangements.

2. *Can These Difficulties be Met by the Courts without Legislation?*

The law of Agency is well developed in Massachusetts by the Supreme Judicial Court. . . . Neither the Court nor the Agency Restatement has yet taken a position on the effect of an atomic emergency. There is no way by which lawyers and businessmen can foretell in advance what the courts of Massachusetts (or any other state) would do if an atomic emergency were to occur. It is vitally important that interested parties know *now* what steps can be taken in advance to safeguard their interests in such a case. Further, the legal consequences of a possible atomic emergency on the rights and duties of agents and those who deal with them should be established and understood before the emergency arises. Under present law this Agency Rule of termination of authority on death, recognized in *Gallup* v. *Barton*, 313 Mass. 379, 47 N. E. 2d 921, 1934, is subject to only two exceptions:

Exception (a): The authority of a bank to pay checks drawn by the depositor continues after the death of the depositor, until the bank has notice thereof, see *Glennan* v. *Rochester T. & S. Co.*, 209 N. Y. 12, 102 N. E. 537, 1913. (In Massachusetts by G. L. Chapter 107, Section 17, enacted in 1885, a 10 day period after death is allowed even after notice of death.) No other kinds of authority are covered by this exception, however.

Exception (b): A "power coupled with an interest" will survive the death of the giver of the power, see *Mulloney* v. *Black*, 244 Mass. 391, 138 N. E. 584, 1923. But this exception is no help at all in the ordinary agency case, for it applies only to irrevocable powers given as security for the benefit of the holder of the power, including powers such as judgment notes, power of sale mortgages, and other similar non-agency powers.

3. *Who will Benefit from the Draft Act?*

Principals, wards, beneficiaries and their families and others interested in their estates, will profit from the provisions which permit action to be taken by their agents and other fiduciaries to protect their interests during a period of atomic emergency. Fiduciaries will be free to continue to act and to receive compensation for doing so, regardless of the death or loss of capacity of their principals or wards. Third persons will know that they can deal in safety with fiduciaries in spite of the uncertainties created in such

an emergency. And the public welfare will also be served, since the Draft Act creates a legal means of continuing to operate vital businesses in spite of the death or loss of capacity of their proprietors.

4. *Does the Draft Act go Far Enough?*

It modifies the law in two important respects during the period of an atomic emergency:

(1) It provides for agents, guardians and conservators to continue to exercise their pre-existing authority, regardless of the death or loss of capacity of their principals or wards; and

(2) It permits principals and certain fiduciaries to give written authority to act on their behalf, effective upon the occurrence of an atomic emergency, to others who were not theretofore their agents.

It has been suggested that it should also provide some form of public authority under the Probate Courts to exercise general agency powers for the estates of persons whose affairs were not included under either (1) or (2) above. This further step appears to be more suitable for consideration as a part of a general plan of extension of governmental powers during an atomic emergency.

This Draft Act is thus well adapted for immediate enactment to cover the fields of agents and other fiduciaries.

5. *Does the Bill Interfere with the Administration of Estates by the Probate Courts?*

The idea of relying on appointments by the Probate Courts or by some substitute for the Probate Courts has been discussed. It might be wise to draft provisions along these lines. But there is no assurance that the Probate Courts would continue to exist in the event of an atomic attack, and an elaborate system of substitutes would be required. This would be necessary and desirable as to persons who neither have agents or other fiduciaries nor appoint special agents under Section 9. But we believe it is better to meet the problem with individual rather than bureaucratic initiative so far as possible. The Draft Act represents organization from the grass roots rather than from the top. It would be effective immediately in the event of atomic war. Resort to governmental authority might take months.

The Draft Act would supplement the existing powers of the Probate Courts to care for the estates of persons where death or loss of capacity occurs to make this necessary. If the Probate Courts are not closed down or overwhelmed with cases as a result of an atomic emergency, the Draft Act will have little effect. Two provisions in Section 10 were inserted to make this clear.

(a) During an atomic emergency, the continuing powers of the agent, conservator or guardian terminate whenever he or a third person acts with knowledge of the appointment by the Probate Court of a representative qualified to act.

(b) By proclamation, the effect of the Act can be terminated whenever the governor or other authorized public official decides that the facilities of the Probate Courts are adequate, through the appointment of special administrators and other measures, to meet

the legal problems presented by the occurrence of the atomic emergency.

Whenever the Probate Courts are not able to meet the emergency, the provisions of the Draft Act would help to do so by use of continuing fiduciary powers. Even special administrators cannot act as such under G. L. Chapter 173 until they receive appointment from some judge of the Probate Court under Section 10, and they cannot legally continue the business for the benefit of the estate without authorization of the Probate Court under Section 12. Some machinery is needed to fill the gap between commencement of an atomic emergency, and the time when the Probate Courts are able to handle the resulting problems effectively and promptly.

But the final paragraph of Section 10 makes clear that the Draft Act is not meant to go further than this. It is not intended that a power of attorney or other agency device should be used, in place of a Will or Trust, to govern the ultimate distribution of the principal's assets after his death, except to the limited extent that Section 11 (f) would permit a principal to authorize an agent to continue during the emergency "such provisions for the support of the dependents of the principal as the principal was accustomed to make." This provision does no more than to maintain the *status quo* for the family and other dependents.

BOOK NOTICES

THE MASSACHUSETTS SUPERIOR COURT: ITS ORIGIN AND DEVELOPMENT

By Alan J. Dimond

(Little, Brown and Company)

We are now informed that this book written as part of the 100th Anniversary of the Court in 1959, after exhaustive search for the facts in libraries in Boston, Worcester, Pittsfield and other parts of the Commonwealth and of material in the Library of Congress, will be published on July 20. The book will contain pictures of all the justices since 1859.

SACCO-VANZETTI: MURDER OR MYTH?

By Robert H. Montgomery of the Boston Bar

(The Devin-Adair Company—$5.00) Advance Notice

"In a year which will see Sacco and Vanzetti brought to life in an operetta, a play, and in books, Devin-Adair will publish, on July 25, 'SACCO-VANZETTI: THE MURDER AND THE MYTH' by Robert H. Montgomery, member of the Boston Bar.

"Mr. Montgomery knew many of the principals of the 1921 trial and the final review in 1927. He has devoted years to a study of

the evidence, and in his book he points to these conclusions, based on the facts of the case:

"That Sacco and Vanzetti were guilty of murder as charged and were properly convicted by a jury of their peers;

That the conviction was based solely on evidence unfolded in the course of a fair trial;

That judge and jury were untouched by the war of ideologies which was waged around the world on behalf of the accused but which did not figure in the trial;

That subsequent reviews by Governor Fuller and the Advisory Committee, were fair and exhaustive;

That the reputations of good men were ruined by Sacco and Vanzetti supporters in their zeal to uphold 'civil liberties';

That bribery, blackmail, and intimidation were used by a defense attorney who finally was obliged to withdraw from the case;

That proved facts of the case have been distorted and suppressed by 'mythmakers.' "

SACCO-VANZETTI: THE MURDER AND THE MYTH will be published as an objective effort to set the record straight.

LEGACY OF SUPPRESSION, Freedom of Speech and Press in Early American History, by Leonard W. Levy, Belknap Press of Harvard University Press, $6.50.

CONFLICT OF INTEREST AND FEDERAL SERVICE, by the Special Commission of the Bar of the City of New York, Harvard University Press, Publication date August 15, 1960.

AN IMPORTANT FEDERAL TAX LIEN CASE

Decided June 15, 1960

The attention of practitioners is called to *United States* v. *Brosnan and Bank of America National Trust & Savings Association*—a 5 to 4 decision—the majority opinion by Harlan, J. and the dissent by Clarke, J. the Chief Justice, Black and Frankfurter, J. J. In one case there was a foreclosure sale under a confessed judgment; in the other, a private sale under a power of sale in the mortgage. The majority held (as reported in Commerce Clearing House) Standard Federal Tax Reporter (9516) that the United States lien for taxes was effectively extinguished by the foreclosure of a superior mortgage lien in accordance with state law and the mortgage foreclosure was not the equivalent of a judicial proceeding against the United States. The United Stats immunity to suit without its consent is not to be extended to a civil action to clear title, following a mortgage foreclosure since the United States lien was terminated by the foreclosure, the action to clear title brought against the United States without its consent was permissible.

OBSOLETE AND UNCERTAIN RESTRICTIONS AND RIVERSIDE IMPROVEMENT CO. VS. CHADWICK, 228 MASS. 242 A CONSTITUTIONAL DISCUSSION

By

CHARLES W. BLOOD *of the Boston Bar*

INTRODUCTORY STATEMENT

The "Quarterly" for December, 1959 (at p. 106) contained a title-clearing bill about such restrictions filed by its draftsmen, Charles W. Blood, former president of the Massachusetts Conveyancers' Association, Albert Wolfe, Director of the Real Property Division of the A.B.A. and Norman T. Byrnes, all active practitioners and members of the Boston bar. As the bill was of state-wide importance it was reprinted to give the bench and bar an opportunity for comment or suggestions.

The bill, H. 1367, was referred by the legislature to the Judicial Council. It is one of a series since 1954, listed by Henry Winslow in his report to the Conveyancers' Association printed in the "Quarterly" for December, 1959 (p. 104). The bill is now under consideration by the Council. The following discussion submitted to the Council in connection with the bill is called to the attention of the bench and bar. Any comments will be welcomed.

F. W. G.

MR. BLOOD'S DISCUSSION

This was a Petition filed in the Land Court under Statute of 1915, Chapter 112, alleging that the Petitioner's land was encumbered of record by certain restrictions, the enforcement of which would be inequitable and injurious to the public interest and praying that the Petitioner's land might be registered free and clear of such restrictions.

The Statute gave jurisdiction to the Land Court to hear and determine the question of whether or not equitable restrictions limiting or restraining the use of the land are enforceable in whole or in part. It provided that if the Court should determine "that the enforcement of such restrictions or limitations or any of them would be inequitable or injurious to the public interests, it shall register title to the land free from said restrictions as and to the extent required by the equities of the case or by the public interests." It further provided that if the court should find and determine that such restrictions, though they ought not to be enforced are nevertheless valid and have not become inoperative, illegal or void because contrary to law or injurious to the public interest, it should, before registering the land free from said restrictions "ascertain and determine whether any person or property entitled to the benefits of such restrictions or limitations, or any of

them, may be damaged by the non-enforcement of the same. If so, the case shall be referred to the Superior Court for the assessment of such damages."

The restrictions in the case at bar prohibited the erection of any building costing less than $15,000 and prohibited the use of any building for an apartment house or for mercantile purposes. The Land Court found that the restrictions *"are valid and have not become inoperative, illegal or void"* that the *removal* of the restrictions *"would result in material damage,* not only sentimentally, but pecuniarily," and would render the dwelling houses of some of the respondents "less desirable as residences, and would depreciate their value" and "render their houses unfit for occupancy for the purpose for which they were erected," and *that there had been no violation of the restrictions within the restricted area.*

The restrictions were established in the expectation that the area to which they applied would be bought for the erection of expensive buildings each devoted to a private residence. The construction of subways, the extension of means of rapid transit and the general use of the automobile has rendered homes in the suburbs more accessible than when the restrictions were established. By reason of these and perhaps other causes the restricted area had become unavailable for the uses for which the restrictions were designed and by far the larger part of it had not been built upon.

The Land Court found that it would be inequitable to enforce the restrictions and that they should not be enforced.

On appeal to the Supreme Court the decision of the Land Court was reversed. At the outset the Court stated that the question is whether the Statute is constitutional *in its operation upon the facts here presented* by permitting the Petitioner to have damages assessed, to pay such damages and thus extinguish the restrictions.

The Court stated that an equitable restriction is a property right in the person in favor of whose estate it runs or to which it is appurtenant. The extent of its enforceability and its value in various circumstances are questions quite apart from its inherent nature. The effect of the present Statute as applied to these facts is to extinguish this right *not for any public use, nor to serve any pubbic end* but merely for the benefit of other private land owners whose estates are less valuable by reason of the existence of the right and who could make more advantageous and profitable use of their own land if these encumbrances were out of the way. It has been found expressly that the *enforcement* of the restrictions would *not be injurious to the public interests.* Each of the respondents is to be forced against his will to surrender his right when it is not "inoperative, illegal or void." He will be obliged to make surrender of this real estate right and accept money damages in place of it *not because demanded by the public interests* but because a neighbor desires it for his private aims. In conclusion the Court stated *that as applied to the facts here disclosed* the Statute deprived some of the respondents of their rights in real property for a private use.

It is submitted that this case does not hold that the Court *cannot extinguish* an easement on the payment of money damages. It cites

without disapproval *Jackson* v. *Stevenson* 156 Mass. 496 where that was done under a *different set of facts.*

The following fact should be noted that the Court repeatedly stated that the decision was as *to the facts disclosed in this case.* The primary point on which the Court insisted was that you could not take land away from A and give it to B unless there was a *public interest involved.* Since that decision there have been many instances where the legislature has authorized the taking of land from A and selling it to B as part of a scheme in which the *public interest was the primary purpose.* The legislation in connection with the Veterans Housing law is in point where land was taken by municipalities and sold to veterans or for the purpose of having houses built for sale to veterans.

The slum clearance cases are a similar instance, those like *Padinis* v. *Somerville,* 331 Mass. 627, in which case the Statute was attacked on the basis that it authorizes the power of eminent domain for the acquisition of land which would be sold to private persons. In sustaining the legislation the Court stated that the fact that the power cannot be used for private purposes is well settled. The plan here, however, properly interpreted, does not have for its primary objective the taking of the property from one individual and turning it over to another. On the contrary, the main purpose of the plan is slum clearance and the disposition of the land by sale thereafter is incidental to that purpose.

It is believed, therefore, by the group submitting the present Bill, that there must be many cases where the extinguishment of an easement would be in the public interest. We have not attempted to spell out these situations. To do so would be difficult because in today's rapidly changing world it is impossible to foresee types of building construction and land use or in general what would be thought to be in the public interest in the future. See Opinion of the Justices, 1960 Adv. 785, 795.

SPACE LAW—LEGAL QUESTIONS INVOLVED

A letter to the members of the Massachusetts Bar Association requesting suggestions

UNITED STATES SENATE
COMMITTEE ON
AERONAUTICAL AND SPACE SCIENCES

June 15, 1960

Dear Mr. President

Among the responsibilities of this Committee is that of evaluating proposals made for the solution of legal problems arising in connection with space exploration. I have noticed with interest that the American Bar Association has a Committee on the Law of

Outer Space and the Federal Bar Association has appointed a Committee on Space Law and Weather Control.

If your State Bar Association has organized a committee to study and report on the problems of space law, or if you are planning to establish such a committee, I should appreciate receiving any information or reports which might assist the Senate Committee on Aeronautical and Space Sciences in its work. It is possible, also, that there are individual members of your Association who may wish to contribute the results of their thinking on the legal problems with which we shall have to deal in the future.

I am enclosing a list of the subjects in which we have a particular interest, although this naturally does not preclude the addition of other topics of concern to any of your members.

With much appreciation, I am

Sincerely,

LYNDON B. JOHNSON, *Chairman*

A LIST OF LEGAL QUESTIONS INVOLVED IN THE STUDY OF SPACE LAW

1. Are the legal provisions contained in national air laws and existing international agreements applicable to outer space, or do we need to formulate new legal concepts for man's activities in the space environment?
2. Do the sovereign rights of nations extend beyond air space into outer space?
3. What are the legal effects of the formal and informal agreements made by nations during the International Geophysical Year when space exploration was conducted in accordance with the concept that outer space is free?
4. What legal provisions should be applied to space vehicles which pass through air space into outer space and then re-enter the earth's atmosphere?
5. What type of organization and regulation of space vehicles can be proposed to provide for such problems as:
   1) The allocation of radio frequencies;
   2) Registration and inspection;
   3) Exchange of information on space-collected data concerning the weather, navigation, and communications?
6. What are the advantages and disadvantages of establishing an international organization with administrative and regulatory authority over space activities?
7. Should the International Court of Justice settle legal problems arising among nations in connection with space exploration?
8. What provision should be made for dealing with cases of liability for damage and injury resulting from space vehicles (a) within the United States; and (b) on an international basis?

PROGRESS OF THE INCOME TAX BILL FOR THE SELF-EMPLOYED

An A.B.A. Release

SENATE COMMITTEE APPROVES PENSION BILL FOR SELF-EMPLOYED

WASHINGTON—A House passed bill designed to give self-employed persons, such as lawyers and doctors, a measure of income tax equality in setting up their own pension plans has taken a big step forward.

The action came late Thursday (June 9) when the Senate Finance Committee approved by a 12 to 5 vote a modified version of the Smathers-Morton-Keogh-Simpson bill (H.R. 10). The pension plan has been under consideration of the committee for many months. This is the first time it has ever had the approval of the Senate Committee during the ten years similar legislation has been before Congress.

The modified bill, which has the approval of the Treasury Department, was expected to be reported to the Senate floor on or about June 16.

American Bar Association President John D. Randall meanwhile urged lawyers and bar officials throughout the country who support the proposed legislation to make their views known to their senators.

Passed by the House in 1959, the bill has had the support of the A.B.A. and many other groups professional and business since it was first proposed.

Mr. Randall said the Association is studying the possibilities for offering a group retirement trust program to A.B.A. members, if and when the bill is enacted.

He said the advantage of such a group plan would be that a member could set up a program with individual options and it would cost him less than a self-administered plan.

As modified by the Treasury Department, the bill would require a self-employed person setting up a retirement plan for himself to allow any employees also to participate.

The bill would permit self-employed persons to set aside for a pension plan up to 10 per cent of his income or $2,500, whichever is less. Payment of income taxes on the money put aside would be deferred until after retirement withdrawals were made.

A.B.A. members and bar officials may secure a summary of the committee approved bill by writing to the American Bar Association, Washington Office, 1120 Connecticut Ave., N.W., Washington 6, D. C.

DISCRETIONARY SEPARATE TRIALS OF LIABILITY AND DAMAGES IN PERSONAL INJURY CASES TO REDUCE CONGESTION

A rule adopted by the Federal judges in the Northern District of Illinois—A Controversial Practice

Lawyers, doubtless, disagree about the practice, but Judge Miner's account of it in a Federal District was described in the A.B.A. Journal for December, 1959 (which goes to almost 100,000 lawyers) and reprints have been widely circulated to bar associations by the A.B.A. Section of Judicial Administration. As it seems likely to become a much discussed issue throughout the Nation we think the bar will wish to know about it. Accordingly we reprint substantial extracts of the article. Perhaps, it should be read in connection with the prediction in the address of Judge Macaulay of our Superior Court at the Lawyers' Institute in June, 1958. (See M.L.Q. for Oct. 1958, pp. 26-31):

> "that the continued cooperation of the bench and bar to meet the challenging demands of the public for the more expeditious and efficient disposition of litigation must continue and even increase to a much greater extent in the years that lie before us."

F. W. G.

FOREWORD

Judge Miner in this excellent presentation has offered a practical and salutary aid to the overburdened District Judge with the congested civil calendar by a simple, logical and thoroughly proper interpretation of one of the Rules of Civil Procedure. I am gratified that his brethren of this court have unanimously ratified his proposal by the adoption of a new rule embracing his splendid suggestions. If other large courts sitting in jurisdictions where the common law rules of negligence are still controlling, see fit to follow our action, the change could well prove the most effective solution yet devised to the ever-increasing problem of calendar congestion. Unless this and similar improvements such as those referred to so ably by Judge Miner in this paper are soon adopted by the courts and the legal profession, the legislative arm of Government, state and federal, will inevitably solve the problem for us by removing this large segment of legal work from the Judicial to the Executive branch of Government in the form of administrative agencies and tribunals. I highly recommend to the entire legal profession a careful study of Judge Miner's discussion.

WILLIAM J. CAMPBELL, *Chief Judge*
United States District Court for
the Northern District of Illinois

EXTRACTS FROM THE ARTICLE BY HON. JULIUS H. MINER

Court congestion is a critical problem which strikes at the heart of the administration of justice. The Attorney General, all the Supreme Courts and all the bar associations are desperately engaged in an effort to solve it. . . .

The volume of personal injury litigation in federal and state courts is appalling in the light of the rapid expansion of population, the astronomical increase of automobiles, the constant speeding of transportation by trains, buses and aviation. The judiciary's work load is becoming more and more burdensome due to an endless flow of new legislation, court rules, current legal periodicals and books which must be read to keep abreast with professional evaluation, besides voluminous briefs to read and intricate opinions to write. While we, in the United States District Court for the Northern District of Illinois, may well take pride in our record in disposing of both old and new cases, we also realize the gravity of the situation. We are determined to avoid any further congestion in our trial calendars and to safeguard our judicial system. . . .

I am a devout believer in our jury system and would vigorously oppose the slightest violation thereof. I am fighting to preserve it by repelling any and every encroachment upon it. Our task ahead is not in reviewing past mistakes and deficiencies but in taking positive and effective remedial action.

Since personal injury cases comprise a great percentage of our litigation, I recommended to my colleagues the adoption of a rule by our court to provide that in personal injury and other civil cases wherein the issue of liability may be adjudicated as a prerequisite to the determination of any and all other issues, both jury and nonjury, the issue of the liability of the defendant or counter-defendant be first adjudicated and the issue of the nature and extent of the injuries and the amount of damages be litigated only after a finding of guilty. This rule may collide with the fixed attitudes of the two small groups of lawyers, for obvious reasons, but it will be a blessing to the vast majority of attorneys for plaintiffs and defendants who want their early day in court. Such a practice will modernize the introduction of evidence, with fewer and simpler issues to be submitted to the jury. It will reduce the trial burden in the numerous cases in which findings of "not guilty" are had in a very large percentage of personal injury cases. *(1958 Proceedings of the Attorney General's Conference on Court Congestion and Delay in Litigation,* page 57.) It will induce defendants to settle in the event of a guilty verdict. It will eliminate or reduce so-called "nuisance" cases in which liability is doubtful. Successful plaintiffs will get prompt hearings with resulting prompt payment, and innocent defendants will be absolved of liability without incurring added expense. It will induce lawyers to prepare for trial more readily. It will afford greater opportunity to apply effectively our recently adopted impartial expert medical testimony rule. (I recommend reading Chapter 11, *Delay in the Court.)* It will result in the true and proper administration of justice.

The rule provides that the trial judge may, in his discretion, order one jury to decide upon the liability of the defendant and the same or another jury to determine the damages of the plaintiffs. *(Opal* v. *Material Service Corp.*, 133 N.E. 2d 722; *Schultz* v. *Gilbert*, 300 Ill. App. 417, 20 N.E. 2d 884; *Baker* v. *Healey Co.*, 302 Ill. App. 634, 24 N.E. 2d 228.) The judge may recess after a decision of guilty on liability for pretrial or settlement conference or proceed with the trial. The right to a trial by jury does not require that all issues be determined by the same jury and severance of the issues is not violative of any constitutional guarantee. *(Gasoline Products Co.* v. *Champlin Refinery Co.*, 283 U. S. 494, 51 S. Ct. 513; *Smyth Sales* v. *Petroleum Heat & Power Co.* (3d Cir.), 141 F. 2d 41; *Simmons* v. *Fish*, 210 Mass. 563, 97 N.E. 102.)

The basis for the rule is the necessity to prevent undue delay in litigation and to promote the interests of all parties. What can be fairer? This rule is not intended as a panacea, but it will definitely establish a turning point and permit revision of our thinking. It will open the legal channels to new reforms. As Justice Brandeis said, "New devices may be used to adopt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice." *(Ex parte Peterson*, 253 U. S. 300 at 309-310.)

The proposed rule is supported by the sound principle that the decision on liability may dispose of the entire case. (88 C.J.S., Trial, §10.) Determining the order of trial issues is a function reserved to the trial judge *(Gross* v. *United States*, 201 F. 2d 780), and the granting of separate trials of distinct issues is within the sound discretion of the trial judge *(Bowie* v. *Sorrell*, 209 F. 2d 49, 43 A.L.R. 2d 781 (4th Cir., 1953). See also, *Eichinger* v. *Fireman's Fund Ins. Co.*, 20 F.R.D. 204 (D.C. Neb., 1957); *Grissom* v. *Union Pac. R. Co.*, 14 F.R.D. 263 (D.C. Colo., 1953); *Container Co.* v. *Carpenter Container Corp.*, 8 F.R. 389; Rule 42(b), Federal Rules of Civil Procedure, 28 U.S.C.A.; *Bedser* v. *Horton Motor Lines*, 122 F. 2d 406 (4th Cir., 1941); *Hall Laboratories* v. *National Aluminate Corp.*, 95 F. Supp. 323), especially where such separation will tend to avoid prejudice, further convenience, promote justice and assure a fair and speedy trial to the litigants. (88 C.J.S., Trial, §9(a); *Chapman* v. *United States*, 169 F. 2d 641 (10th Cir., 1948), *certiorari denied*, 335 U. S. 860). This has been noted even in cases holding that issues should not be tried piecemeal. *(Rickenbacker Transp., Inc.* v. *Pa. R. Co.*, 3 F.R.D. 202 (S.D. N.Y. 1942); *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 83; *Liquid Carbonic Corp.* v. *Goodyear Tire & R. Co.*, 38 F. Supp. 520; *Zenith Radio Corp.* v. *Radio Corp. of Am.*, 106 F. Supp. 561.)

Rule 42(b) of the Federal Rules of Civil Procedure clearly sanctions the rule. It provides:

> *Separate trials.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issues or of any number of claims, cross-claims, counter-claims, third-party claims, or issues.

Rule 83 of the Federal Rules of Civil Procedure provides:

Rules by District Courts. Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

The Federal Rules of Civil Procedure govern jury trials as well as non-jury trials. *(United States* v. *American Optical Co.*, 2 F.R.D. 534 (S.D. N.Y., 1942.) Under Rule 42(b) the court is empowered to isolate and try any issue in a case. *(Carr* v. *Beverly Hills Corp.*, 237 F. 2d 323 (9th Cir., 1956), reversed on other grounds, 354 U. S. 917, rehearing denied 355 U. S. 852.)

Upon these facts and authorities, the Judges of the United States District Court, Northern District of Illinois, Eastern Division, have unanimously adopted the following rule:

Pursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a prerequisite to the determination of any or all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counterclaim or third-party claim.

In the event liability is sustained, the court may recess for pretrial or settlement conference or proceed with the trial on any or all of the remaining issues before the Court, before the same jury or before another jury as conditions may require and the Court shall deem meet.

The court, however, may proceed to trial upon all or any combination of issues if, in its discretion, and in furtherance of justice, it shall appear that a separate trial will work a hardship upon any of the parties or will result in protracted or costly litigation.

An early determination of the liability issue will dispose of the entire case in the 40 per cent of trials which result in "not-guilty" verdicts. *(Delay in the Court*, page 99.) In those cases it will save the 70 to 80 per cent of trial time generally consumed by medical testimony, hospital records, X-rays, physical examinations and treatment pertaining to the nature and extent of the injuries and the amount of damages. We have all presided over many cases which were settled after convincing proof of liability had been introduced or when both parties realized the futility of further litigation. Many exaggerated *ad damnum* cases have been non-suited under such circumstances for a minimum settlement hardly sufficient to cover the costs.

The rule is limited to personal injury and other civil cases wherein the issue of liability is separate from and independent of the issue

of damages. There are some common law cases in which damages must be proved in order to establish liability, as in suits predicated upon fraudulent transactions, and we should, therefore, leave the separation of issues in cases wholly within the discretion of the trial judges *(McClain* v. *Socony-Vacuum Oil Co.,* 10 F.R.D. 261; *Mount* v. *Dusing,* 414 Ill. 361, 111 N.E. 2d 502).

The function of improving the procedural phase of the law for the achievement of justice is committed to the courts. (Pound, "Procedure under Rules of Court in New Jersey," *Harv. L. Rev.* 28 (November, 1954).)

The new rule is grounded on necessity and public welfare. The crucial problem which this rule attempts to alleviate demands the intervention of an intelligent, constructive and progressive judiciary. By having adopted this rule, our court has given real meaning to the wisdom of Attorney General William P. Rogers *(1958 Proceedings of the Attorney General's Conference on Court Congestion,* page 6):

> In the years ahead I believe our profession must give greater emphasis to improving the administration of justice in order to provide the public with better service. Our profession has just one product: justice for people. We must expedite the administration of justice so that the right result is obtained at the right time for the person involved. There is a growing demand throughout the country that we work for this objective.

It was with a sense of great concern and deep dedication that I recommended the adoption of this measure. We judges have a solemn duty and opportunity.

THE HUMPHREY RESOLUTION TO REPEAL THE CONNALLY RESERVATION AS TO JURISDICTION IN THE CHARTER OF THE UNITED NATIONS

This resolution pending before the Senate, involves such far reaching consequences to the future Government and citizens of the United States that we think the controversy in regard to it should be presented to the members of the Massachusetts bar whether or not they are members of the American Bar Association. Public hearings before the Committee on Foreign Relations were begun last winter and discontinued and it is reported that no action will be taken by Congress at the present session. The controversy is, however, very much alive in the House of Delegates of the American Bar Association. A committee report and a debate is expected in the House at the Washington meeting at the end of August. The proposal to repeal is vigorously supported by Mr. Rhyne, a former president of the American Bar Association, and others including Attorney General Rogers in articles and addresses widely circulated as part of the movement for "Peace Through Law."

In 1947, the House voted in favor of repeal. Since then many men have changed their minds in the light of subsequent happenings and meditation and a motion was made by Mr. Willy, former chairman of the House, and others, at the meeting in February that the House reconsider and rescind the action of 1947. The motion was referred to a committee to report at the Washington meeting.

As a Massachusetts member of the House who joined Mr. Willy's motion, I think members of the Massachusetts Bar should be informed of our reasons. Accordingly we reprint from the American Bar Association Journal two articles—one by Mr. Willy and the other by the undersigned.

F. W. G.

The World Court and the Connally Reservation

Mr. Willy recalls the history of the International Court of Justice and outlines the background of the "Connally Reservation" which has recently become a matter of nationwide debate. He explains why a group of members of the House of Delegates are seeking a rescision of the Association's official position in opposition to the reservation, a stand taken in 1947 at the height of the post-war era of good feeling.

BY ROY E. WILLY

Of the South Dakota Bar (Sioux Falls)

Former Chairman of the House

(Reprinted by permission from the American Bar Association Journal for May, 1960)

One of the principal purposes of the United Nations is stated to be: "To bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settle-

ment of international disputes or situations which might lead to a breach of the peace."[1] This same object was also the purpose of the League of Nations. Peaceful settlement of international disputes which might, if not so disposed of, lead to the manifold horrors of war has long been the aim of many people and of many nations, including our own.

Unfortunately, in international affairs between nations, as in private transactions between individuals, it still requires two parties to make a bargain, and in the past it has not always been possible to secure the consent of the necessary parties to insure peaceful solution of international disputes. Certainly, in those cases in the not-too-far distant past in which dictatorship has sought to enlarge its scope of influence by extending the territorial boundaries of its country, a peaceful solution could be secured only at the cost of abject and unconditional surrender.

Whether the United Nations can prove any more successful in preventing deliberate acts of aggression on the part of ruthless and predatory dictatorship than its predecessor, the League of Nations, still remains an open question. The issue was presented to the world in the recent Korean struggle where, although there was intervention by the United Nations, a major conflagration was avoided. Whether this same result would have been reached had the forces of the United Nations waged other than limited warfare was not determined.

As an adjunct to the League of Nations, there was created in 1920 a "Permanent Court of International Justice,"[2] under provisions contained in the League Covenant. Its jurisdiction depended solely upon the consent and voluntary participation of the parties to a dispute. Its activities were interrupted by the outbreak of hostilities in World War II and in 1946, its existence terminated with the dissolution of the League of Nations.[3]

Historically, the first serious effort to create machinery for the settlement of international disputes by other than armed hostilities occurred in 1899 in connection with the First Hague Conference, at which time the powers who participated in this Conference signed the "Hague Convention for the Pacific Settlement of International Disputes."[4] In 1907 at the Second Hague Conference, a Permanent Court of Arbitration was created, a body that still remains in existence.[5] The extinction of League of Nations carried with it the Permanent Court of International Justice. This gap in the world judicial organization was filled by the creation of a new judicial structure provided for in the Charter of the United Nations. The form and judicial substance of this organization is almost identical with the old Permanent Court of International Justice and at the

References made for statistics quoted are largely taken from the report of a Special Committee of the House Judiciary Committee on the International Court of Justice and the International Criminal Police Organization made to the First Session of the 86th Congress on April, 1959. Reference to this report will be abbreviated H.J.C.

Reference is also made to a publication of the United Nations entitled "The International Court of Justice" in 1957, which is cited as I.C.J.

[1] I.C.J., page 1.
[2] I.C.J., page 4.
[3] I.C.J., page 4.
[4] I.C.J., page 3.
[5] I.C.J., page 3.

first meeting of the new body, it adopted, with few changes, the rules of court of its predecessor.[6]

The present International Court of Justice consists of fifteen judges who, under the provisions of its Charter, are elected by the General Assembly and the Security Council of the United Nations. The judges are chosen from lists of persons submitted by the various national groups who, as members of the United Nations, also belong to the Permanent Court of Arbitration, and in the case of members of the United Nations who do not belong to this court, separate lists are submitted. The General Assembly and the Council each holds a separate election and the successful candidates must obtain a majority of votes from each of these two separate bodies. Judges of the International Court are elected for nine-year terms and are eligible for re-election. Their terms are staggered so that five judges are selected every three years. Provision is also made that in any case before the court in which there is a judge of the same nationality as one of the parties, the other party may choose a person to sit as judge *ad hoc* and if the court contains no judge of the nationality of any of the parties, each party may select a judge *ad hoc* who will serve in that case with the right of participation and vote. Under the Charter, not more than one judge from any member nation can be a member of the court at the same time.[7] The yearly compensation of the judges is $20,000 each and the cost of its administration since its creation in 1946 has been $8,457,000.[8]

Since its organization in 1946, the court has entertained twenty contentious cases[9] and eleven advisory questions have been submitted to it by the United Nations for opinions.[10] However, of the twenty cases presented to the court, in seven the court did not have power to consider because either it lacked jurisdiction or the cases were withdrawn. One was a reconsideration of an earlier case, and two are still pending, making a net of ten cases in which the court has actually rendered a decision on the merits in the thirteen years of its existence.[11] Of the eleven advisory opinions which were submitted to the court, none were concerned with peaceful settlement of disputes.[12] In this respect, its record does not approach that of the old Permanent Court of International Justice created by the League of Nations. In the seventeen years of its active existence, that court dealt with 79 cases, of which 51 were contentious cases referred to it by states either by special agreement or by unilateral application, and 28 arose from requests for advisory opinions submitted by the Council of the League of Nations.[13]

Under Article 93 of its Charter, all members of the United Nations are automatically members of the International Court of Justice. However, no member nation is bound by the compulsory jurisdiction of the court without a specific declaration accepting such jurisdiction. To date thirty-nine member nations have by declara-

[6] I.C.J., page 5.
[7] I.C.J., pages 5 and 6.
[8] H.J.C., page 9.
[9] H.J.C., page 2.
[10] H.J.C., page 2.
[11] H.J.C., page 2.
[12] H.J.C., page 6.
[13] I.C.J., page 5.

tion accepted compulsory jurisdiction by the court in specific areas of international law.[14] None of the Communist block of nations, including the Soviet Union, have accepted the court's compulsory jurisdiction.[15]

In connection with the work of the court, much has been said and much more written about the "Connally Amendment," which came about in 1946 when the United States recognized and accepted the jurisdiction of the court.[16] This acceptance of the jurisdiction of the World Court is subject to a six-word amendment to sub-paragraph (b) which reads: "Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States." To this phrase Senator Connally added the words "as determined by the United States." Of thirty-nine nations which have accepted the jurisdiction of the International Court, many of them have likewise placed limitations on the court's power with regard to its jurisdiction. In addition to the domestic jurisdiction reservation, several countries, including the United States, have likewise restricted the applicability of their declarations to "legal disputes hereafter arising." Others have excluded disputes which affect their "national security" and others, disputes arising out of events occurring at a time when they were involved in hostilities.[17]

The Cold War was waiting in the wings in 1946 and had not yet made its appearance on the stage. The House of Delegates had been represented by an official group of observers at the birth of the United Nations. As lawyers, we were well aware of the fact that a feeling existed in the world that the failure of the League of Nations to accomplish its mission of insuring world peace might, in a degree at least, have been due to the failure of the United States to ratify its Covenant. Peace and harmony appeared to prevail throughout the world. There was a strong sentiment to the effect that the Connally Reservation might jeopardize this situation and that the failure of the United States to accept the full jurisdiction of the International Court of Justice without reservation would have an adverse result on the rest of the world. This sentiment in the American Bar Association was responsible for the resolution introduced in the Assembly at the 71st Annual Meeting at Atlantic City in 1946. The resolution contained a recommendation to the effect "that the Senate of the United States should reconsider the subject of the declaration of compulsory jurisdiction, and should eliminate therefrom the right of determination by the United Nations as to what constitutes matters essentially within the domestic jurisdiction."[18] The Resolution was brought before the House of Delegates and action on the resolution was postponed to the Midyear Meeting of 1947.[19] At the 1947 Midyear Meeting, the House of Delegates adopted a resolution embodying the context of the Assembly proposal and recommended that the Senate of the United States "authorize the filing of a further declaration which shall not con-

[14] Vital Issues, Volume IX, No. 6.
[15] H.J.C., page 3.
[16] Sen. Res. 196, August 2, 1946.
[17] H.J.C., page 7.
[18] 71 A.B.A. Rep. 91.
[19] 71 A.B.A. Rep. 148.

tain the reservation or conditions to which the foregoing resolutions relate."[20] This amended resolution was approved by the Assembly at its 1947 Annual Meeting.[21] The Senate of the United States took no action towards repealing the Connally Reservation and the matter remained more or less dormant until it was brought to attention by a number of prominent individuals, including the present Attorney General.

On March 24, 1959, Senator Humphrey introduced Senate Resolution 94, which re-enacts the resolution of August, 1946, but deletes the six-word amendment proposed by Senator Connally and adopted by the Senate. The matter did not again come before the House of Delegates until the Midyear Meeting at Chicago on February 22, 1960. At that time a resolution was introduced, signed by eleven members of the House of Delegates, the purpose of which was to ask the House to rescind the action taken in 1947 and urge upon the United States Senate the retention of the Connally Reservation. This resolution was not debated before the House on its merits but on motion was referred to a Special Committee on World Peace Through Law.

A report of a special committee of the House Judiciary Committee on the International Court of Justice and the International Criminal Police Organization presented at the first session of the 86th Congress uses this language with reference to the Connally Amendment: "The Connally amendment basically is of good purpose. It seeks to safeguard matters which are essentially of domestic concern to the United States. Under the United Nations' Charter, the International Court has jurisdiction only over questions of international law—not domestic matters. It therefore does not seem unwise, in the absence of treaties and any developed principles of international law, that such items of immigration and certain aspects of our postal or atomic energy laws which are essentially domestic matters be reserved to the United States for a decision."[22]

This same report further calls attention to the fact that so far as the special committee could determine, there are no clear cut rules recognized in international law as to what are and what are not domestic issues.[23] Therefore, the United States reserved to itself the right to decide this question in controversies in which it is involved. This possessed the advantage at least of preventing an encroachment on domestic jurisdiction. At the present time the United States is and for many years has been engaged in a world-wide relief program, under which billions of public funds have been expended in military aid, as well as in varied forms of economic assistance to less fortunate nations. Questions involving these voluntary gifts made by this country, made on an international scope, certainly involve questions of purely domestic policy which the United States would not wish to surrender to a Court of International Justice.

The future of the Panama Canal which is vital to the safety and

[20] 72 A.B.A. Rep. 77.
[21] 72 A.B.A. Rep. 82.
[22] H.J.C., page 7.
[23] H.J.C., page 8.

security, as well as economic prosperity of the United States, might easily be determined to be a question of international law by an international court. Our security depends upon its remaining a domestic question, free from possible interference by a hostile international court.

Questions involving immigration have an international aspect but so far as this country is concerned, are purely domestic questions. The retention or discontinuation of the sugar subsidy which has bolstered the economy of Cuba for many years is, so far as the United States is concerned, purely a domestic problem and not one which should be submitted to an international court in the event this country should seek to change, alter or discontinue the subsidies entirely.

The International Court as an instrumentality seeking to maintain world peace is deserving of the support of every lawyer and of every citizen not alone of this country but of the world. The consequences resulting from holocaust possible under an atomic war stagger the imagination. However, there are benefits and privileges which come to the citizens of the United States which we feel are worth retaining and should not be sacrificed as the price of membership in the present International Court. Less than 50 per cent of the present members of the United Nations have accepted the compulsory jurisdiction of the world court. Of those who have accepted, many have done so with one form of reservation or another. Neither Soviet Russia nor any of its satellites have accepted compulsory jurisdiction by the world court. Until the world, or at least a substantial portion of it, including the principal great powers, have accepted compulsory jurisdiction of the world court, the court as such has but little influence in the settlement of disputes between powers, except as the powers themselves voluntarily consent to the court's jurisdiction. If, as and when circumstances should arise that would make it possible for a world court to be a true representative of a judicial structure as understood by the English-speaking world, the United States will be jeopardizing this domestic peace, tranquility and security by accepting without the reservation compulsory jurisdiction of the present international court.

It is true that the scope of the court's activities has been severely restricted by virtue of the fact that a majority of its members have never accepted its compulsory jurisdiction. It is doubtful if the Connally Reservation and similar reservations by other complying members have had any material effect on the court's activities. At least the United States and the thirty-eight other nations which have accepted compulsory jurisdiction do submit their international disputes to the court. However, there is no way of compelling non-complying members to accept the court's jurisdiction and no means exist other than by consent of the non-members to acquire jurisdiction over such nations. It is also worthy of note that even the General Assembly of the United Nations has made but small use of the facilities of the court and in the fourteen years of the court's existence has referred but eleven questions to it for advisory opinions. It is unfortunate that the International Court does not have a wider

recognition but certainly it is not the Connally Reservation which has deprived it of the opportunity to be of service to the world.

The matter of the Connally Reservation was again brought before the House of Delegates at its Midyear Meeting because of the fact that the failure of the House to reverse the action taken in 1947 is continually cited by those who favor the repeal of the Connally Reservation as representing the present sentiment of the American Bar Association. Those who favor the repeal of the Connally Reservation continually use in their propaganda the fact that the American Bar Association has since 1947 favored its repeal.[24] It is self-evident that this attitude does not represent the unanimous sentiment of either the American Bar or the House of Delegates. The sponsors of the resolution which was presented at the Midyear Meeting and referred to the Committee on World Peace Through Law feel that the members of the House are entitled to an opportunity to consider again the matter fairly on its merits and are confident that this opportunity will be presented to the members at the Washington meeting.

[24] "The American Bar Association has consistently opposed it since 1946." Vital Issues, Volume IX, No. 6.

An American Medley, Chapter II

The Connally Reservation and "Peace Through Law"

BY FRANK W. GRINNELL

(Reprinted by permission from the American Bar Association Journal for July, 1960)

I was one of the members of the House of Delegates who joined in Roy Willy's motion in February to reconsider and rescind the action of the House in 1947 favoring the repeal of the Connally reservation. With the hope that it may help, I state my present approach to the problem for consideration in advance of the expected debate in the House in August. I agree with Willy's article in the May issue of the Journal.

I have also read with interest and some entertainment the article in the May Journal by Mr. Briggs on the "cloudy prospects" of "Peace Through Law." I say "entertainment" because he begins with several quotations from my article on Lord Dowding in the Journal for April, 1959 in which I stated that "if liberty under law is the hope for a peaceful world, the 'Leader of the Few' [Lord Dowding] deserves, *for our sakes*, to be known and remembered by the American Bench and Bar in connection with 'Law Day' as a continuity."

Mr. Briggs then says:

> "The continuity here envisaged is with the school of natural law whose chosen votaries would extract the law from a supernatural authority."

This entertains me as I was not aware that I was a "votary." Mr. Briggs does not refer to the first part of the article and evidently missed its purpose which was simply to introduce to the profession in America a man whom I consider one of the refreshingly humble and really great men of this century, who almost alone foresaw, prepared for and stopped the land invasion of England in "The Battle of Britain," and, thus, helped to protect the civilized world, including America and its opportunity for such "liberty under law" as it possessed if willing and able to maintain it. As I stated such a man has at least one foot on the ground. Whatever anyone thinks of his personal beliefs, such a "Leader of the Few" his character and achievements should be known and remembered as a bulwark of American government.

As to "law," if you don't keep your balance physically, you fall down; if you don't keep your internal intellectual and spiritual balance you make external mistakes. You can call that "natural" law as Hatton Sumners does, or the law of history or what you will, but it seems to be whatever it is, and, incidentally, the internal result of Lord Dowding's beliefs. He did not make mistakes about the "The Battle of Britain" from 1936 to 1940. But enough of this.

Returning to the Connally reservation, Mr. Briggs opens his article with the sentence, "There is danger the hopes for 'peace and liberty under law' are being exaggerated." I agree with him that there is not only "danger," but that they are being exaggerated and that it is time for us to remember the far-reaching words of Edmund Burke—"Provident fears are the Mother of Safety." Those are not pusillanimous words. They are common sense.

I submit the substance of what I have submitted, in a more rambling way, to the Committee on World Peace Through Law to which the motion to reconsider and rescind the vote for repeal the Connally reservation referred by the House in February.

The Conference at Dumbarton Oaks did not suggest an international court. I sat in at the first Conference in Boston on that subject presided over by Prof. Manley Hudson. Eight or more Conferences followed in other cities with the result that William L. Ransom, former president of the A.B.A. and Editor of its Journal went to San Francisco and helped in adding the Court to the U.N. Charter. None of us, I think, "thought through" the details of jurisdiction. I certainly did not. The Senate with the support of Senator Vandenberg and a large majority adopted the Connally proviso that the jurisdiction should not include our "domestic affairs."

I was also a member of the House in 1947 and, like others now in opposition, voted in favor of repeal without much thinking, on the assumption that the International Court would deal only with clearly international mattters. In an article in the Journal for November, 1959, I emphasized the right, essential to balanced thinking, of individuals and representative bodies to change their minds before it is too late. As I stated on the floor of the House in February, all of us do that frequently, if we are wise enough, to avoid mistakes. In view of what has happened since 1947 (see Willy's article) I have

changed my mind and joined the opposition to repeal. In this connection, I respectfully ask readers to remember in their thinking the lines of Edward Rowland Sill in "The Fool's Prayer":

"Our faults no tenderness should ask;
But for our blunders . . .
Earth has no balsam for mistakes;
But Thou, O Lord,
Be merciful to me a fool!"

The A.B.A. Journal for February, 1950 contained an article entitled "The Emperor's Clothes—An American Medley," of which this is a second chapter. That article began:

There is a well-known story about Benjamin Franklin. When the Philadelphia Convention of 1787 adjourned after framing the Constitution of the United States, a lady asked him, "Well, Doctor, what have we got—a monarchy or a republic?" Franklin answered, "A republic, *if you can keep it.*"

In *The Forgotten Man's Almanac,* (published in 1943 by the William G. Sumner Club of Yale) which contains a quotation from Sumner for every day in the year, we find the following:

> The only security is the constant practice of critical thinking.
> The seduction of power is just as masterful over a democratic faction as ever it was over king or barons.
> In former days it often happened that "The State" was a barber, a fiddler, or a bad woman. In our day it often happens that "The State" is a little functionary on whom a big functionary is forced to depend.

In the *New York Times* of February 13, 1949 (page 62), General Dwight D. Eisenhower was quoted as saying to a group of young high school leaders, "There is a kind of dictatorship which can come about through a creeping paralysis of thought."

In *Colliers* for March, 1949, General Omar Bradley followed with an article in which he said:

> The state is an invention of men. It has neither intellect, nor conscience, nor morals. It is an inanimate machine. And where the machine is master of the man it is simply fueled by his obedience, his fatigue and his terror.
> A democracy such as ours cannot be defeated in this struggle; it can only lose by default.
> It can only lose if our people deny through indifference and neglect their personal responsibilities for its security and growth. Our danger lies are not so much in a fifth column whose enmity is avowed. It lies in a first column of well-meaning American citizens who are one hundred per cent Americans in their daily protestations and ten per cent citizens in their routine of neglect.

To what extent are all these remarks true?

Then followed Hans Christian Andersen's story in which some weavers sold the Emperor some new clothes which were greatly admired in a grand procession until one little child cried, "But he has nothing on."

In meditating on the Connally reservation the question to which I have seen no convincing answer is "how many clothes will the American people have left if the Connally proviso is repealed?"

With recent international developments staring us in the face, how can we safely repeal the Connally proviso? How much "peace" would the repeal promise? What are, or will be, our "domestic affairs" in the judgment of a mainly foreign court if the Connally proviso is repealed? The usual answer that I get in conversation is, "some risks must be taken." Of course, but what risks? It is dangerous to live at all and life gets more dangerous in many ways every day.

Ralph Waldo Emerson, in his "Representative Men" referred to the inscriptions on the three gates of Busyrane (wherever that is or was)—the first inscription "Be bold"—the second "Be bold, be bold and evermore be bold"—the third (and balancing inscription) "Be not too bold."

Quoting again from the previous article in the Journal for 1950—

"How many stars can we hitch our wagon to without losing the wagon by having it pulled apart? Just how wonderful are the 'clothes' which the Republic is to wear? As stated in the preambles of the Federal and of the Massachusetts Constitution, our 'republic' was founded for 'posterity,' which means children. Are those children to see, too late, that 'the emperor has no clothes'?

"We have 'loyalty oaths,' and we make and listen to and applaud speeches about our 'glorious heritage,' but how much do we think about what it means or how it may be weakened to the point of extinction?

"To what extent do we want the American Government to be gradually made over through the treaty-making power? How much do we know about what is going on in that direction?

"To what extent is the heritage of our Bill of Rights and of the principle of individual responsibility for local self-government being gradually sucked up or poured out in the direction of the Central Government?

"Is the Federal Government reversing history and its constitutional character as one of delegated powers, and becoming the practical source of all power without our knowing it?

"If so, is this an inevitable development of history? Does it mean that our constitutional balanced government of states and nation is an American dream that Americans are no longer capable of keeping and operating? Or is it the result of 'creeping paralysis' and erosion of American thought and the accretion of centralized power in Washington?"

The United States is a *great* power, a fact which by itself is a standing target for hostile or jealous power seekers. With "domestic affairs" undefined just what basis in human history is there for all the confidence in the *future* nomination and selection of 14 foreign judges? Demosthenes in his 2nd Phillipic warned us that the great safeguard, especially in a democracy, was "mistrust" of power. American constitutions were intended to restrain the human itch for power. Also is there no limit to the treaty power? Can that

power be so stretched as to authorize the President and the Senate to subjugate the whole American people to a foreign court of changing membership composed almost entirely of foreigners probably or certainly not really familiar with the structure of our Constitution republic or American conditions?

If Americans can and want to circumvent their own constitution by making the treaty power the only supreme dominant clause and broad enough to change the structure of the government regardless of all the rest of the document and without a constitutional amendment, what will happen to our "heritage" as a "free people" and why should we expect Mephistopheles and some of his foreign diabolical disciples, present or future, to restrain their desires to circumvent the jurisdiction in U.N. Charter? Is this an extreme question? I have an impression that Mephistopheles cannot be effectively exterminated by the human beings simply by putting something on paper. Am I wrong? Think it over.

Government, like the eggs in an omelet, cannot be taken out of "politics" because it is politics, good or bad, or indifferent. I am not a pessimist, but a chronic optimist. I think it a daily "miracle" that we are not far worse off than we are. Jeremiah Mason said more than a century ago that history demonstrated that legislative bodies (and it is true of other officials and bureaucrats) "stretch their powers to the utmost." In the light of experience since then he might have added "or beyond their powers."

Comparison of the *international* Court with our *national* Supreme Court does not impress me. I think that argument is mistaken. They are not comparable except in the greater danger of mistakes in the foreign court in the matter of "domestic affairs."

"Peace" seems to me a state of mind which must grow. How can it be bought by a unique constitutional republic of state and nation like ours by bargaining *with the world* beyond the survival of our constitutional republic? Read Hatton Sumners' recent little book "The Private Citizen and His Democracy" and see how he demonstrates our constantly growing "totalitarian" *bureaucracy.* The life-time thinking of a dedicated man like Hatton Sumners with (as Bob Storey says) "a ringside seat" for 34 years in Congress, much of the time as chairman of the House Judiciary Committee, is American history which American citizens cannot afford to ignore.

Think about Washington's warning against *permanent* foreign alliances. In these days of wars, recent, present, future, "hot" or "cold," some alliances are inevitable, but would not the repeal of the Connally proviso be the kind of *permanent* alliance peculiarly within that warning?

Would not the repeal wreck the movement for "peace through law" which must be approached by example and not compulsion?

While writing this paper, I have read and reread the debate between my friends Frank Holman and Charlie Rhyne, published in the *Christian Science Monitor* of April 28th and sent to us by Joe Stecher, the American Association, Director of Activities. Rhyne quotes Holman in 1947 and then states that he has changed his mind. So he has and I saw him do it and why. He considered it a

duty. Hatton Sumners, suggests that we need "a Bill of Duties to go with our Bill of Rights . . . in the Statesmanship of Democracy." I appreciate Rhyne's idealism as well as that of his distinguished supporters. I happen to be an idealist and enthusiast of sorts myself and I understand the impulse, but I cannot swallow their judgment in this matter.

Some among readers of the Journal may have thought about some of these things. My purpose is to suggest that you think about them again because I have not, thus far, been able to get away from them —especially "The Emperor's Clothes," Demosthenes, and the inscription on the 3rd gate mentioned by Emerson. The late George M. Stearns, a witty lawyer of central Massachusetts, said, "It's a damn poor sermon that don't hit me somewhere." Perhaps something in this "medley" may "hit somebody somewhere."

FRANK W. GRINNELL

NOTE

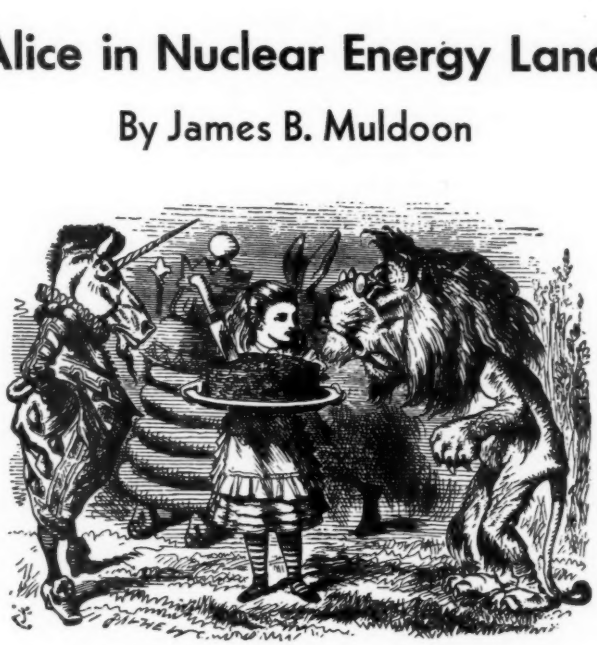
It may also interest readers to know that Judge Ransom, a leading supporter at San Francisco, of the provision in the charter for a court, as explained in the article, also "changed his mind" after 1947 and believed that the Connally reservation was essential to the protection of the American people in the preservation of their form of government—their "republic," as Benjamin Franklin said, "if you can keep it."

F. W. G.

PART VII

Alice in Nuclear Energy Land

By James B. Muldoon



PRDC
THE 50 MILLION DOLLAR "WHITE ELEPHANT"

(And Other Nuclear Folksongs and Madrigals)

"It's a Snark!" was the sound that first came to their ears,
And seemed almost too good to be true.
Then followed a torrent of laughter and cheers:
Then the ominous words: "It's a Boo—"

— LEWIS CARROLL

A Reactor is Remanded for Further Reactions

On June 10, 1960, the U. S. Court of Appeals for the District of Columbia Circuit filed its decision in the case of International Union of Electrical, Radio and Machine Workers, AFL-CIO; United Automobile, Aircraft and Agricultural Implement Workers of America; et al. vs. United States of America and Atomic Energy Commission, defendants; and Power Reactor Development Company and the State of Michigan, intervenors.

The matter in controversy was a petition to review an order of the AEC entered May 29, 1959 confirming (with some modification) the issuance of a "provisional construction permit" for the erection of a fast neutron-breeder power reactor at Laguna Beach, near Monroe, Michigan.[1]

In its petition to review the decision of the administrative agency, the Atomic Energy Commission, the union trio alleged four separate errors of law. The only point decided by the Circuit Court of Appeals was the first:—

> "I. The Commission Violated the Atomic Energy Act of 1954, and Its Own Regulations, by Continuing in Effect the Provisional Construction Permit Issued to Power Reactor Development Company on the Basis of a Finding that There is Reasonable Assurance in the Record, for the Purposes of This Permit, that a Utilization Facility of the General Type Proposed by the Company Can Be Constructed and Operated at the Proposed Site Without Undue Risk to the Health and Safety of the Public."[2]

In summary, it was the ruling of the majority of the court (in an opinion by Edgerton, Circuit Judge), that the decision of the AEC on May 29, 1959, after the administrative hearing, could not be allowed to stand.

> "Because we think the safety findings insufficient, we must set aside the Commission's grant of a construction permit and remand the case for such further proceedings consistent with this opinion as the Commission may determine. We need not consider other points raised by the petitioners."

In arriving at its conclusion the court made a subsidiary finding of fact and law to the effect that "the Commission's findings regard-

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[1] See: M.L.Q., July, 1958, Vol. XLIII, page 68.

[2] In its brief in the Circuit Court, the union group gave the following "Statement of Questions Presented."

1. Did the Atomic Energy Commission violate the Atomic Energy Act of 1954, and its own regulations, by (1) issuing, and (2) continuing in effect over objection, a permit for construction of an atomic energy power reactor without finding that (a) there was information sufficient to provide reasonable assurance that a utilization facility of the general type proposed could be constructed and operated at the proposed site without undue risk to the health and safety of the public; and (b) there was reasonable assurance that technical information omitted from and required to complete the application would be supplied by the applicant; and (c) the applicant is financially qualified to engage in the proposed activities, to assume responsibility for the payment of Commission charges for special nuclear material, and to carry out the proposed use of the material for a reasonable period of time?
2. Are the Commission's findings concerning financial qualification of the applicant supported by substantial evidence on the basis of the record as a whole?

ing safety of operation are ambiguous. In view of the nature, size, and location of the project, we think the findings should be uncommonly free from ambiguity. The Commission should 'make the basis of its action reasonably clear. We cannot find that it did so here.' *Radio Station KFH Co.* v. *Federal Communications Commission*, 101 U. S. App. D. C. 164, 166, 247 F. 2d. 570, 572. 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'" (Cases cited.)

* * * * *

We have previously outlined the story of the PRDC reactor being erected to supply atomic electric power to some of the 1,250,000 customers of the Detroit Edison Company. Located deep in Walter Reuther territory, about half way between Detroit and Toledo, this power plant has been called "the most advanced and least understood of the large power reactors" proposed for the electric industry's reactor demonstration program.

The legal history of PRDC is of considerable interest because it is the first such case to be decided. Except in the matter of access to classified information, it served as a demonstration that the matters arising within the province of the AEC could be handled by the normal administrative procedures under which federal agencies operate in many fields. It will be for the future to determine whether or not the AEC will profit by its errors in this controversy. The following timetable will be of some assistance:—

January	6, 1956	PRDC files application for construction license.
June	10, 1956	Report of the Advisory Committee on Reactor Safeguards.
June	29, 1956	Portions of the Advisory Committee report released by AEC Commissioner Murray, full text withheld.
August	4, 1956	"Provisional" construction permit issued to PRDC by the AEC, after amendments to original application.
August	31, 1956	"Petition for Intervention and Request for Formal Hearing" filed by United Auto Workers and Walter P. Reuther, et als.
October	8, 1956	AEC issues order allowing the union to intervene and setting the case down for hearing; full text of the Advisory Committee letter released for publication.
January	9, 1957	Hearings commenced, with various interruptions.
August	7, 1957	Hearings concluded before AEC hearing examined.
November	29, 1957	Final briefs filed on facts and law.
May	29, 1958	Oral arguments presented to the AEC commissioners.
December	10, 1958	AEC issues tentative decision.
May	26, 1959	Final decision of the AEC became effective, objections of the unions were over-ruled, and the construction permit was confirmed, with some modifications.
July	1959	Appeal by the Unions to the U. S. Circuit Court for the District of Columbia.
June	10, 1960	Decision of the Circuit Court setting aside order of the AEC, and sustaining the objection made by the UAW in regard to matters of safety.

We Told You So!

"It's excessively awkward to mention it now—
As I think I've already remarked.
And the man they called 'Hi' replied, with a sigh,
I informed you the day we embarked."

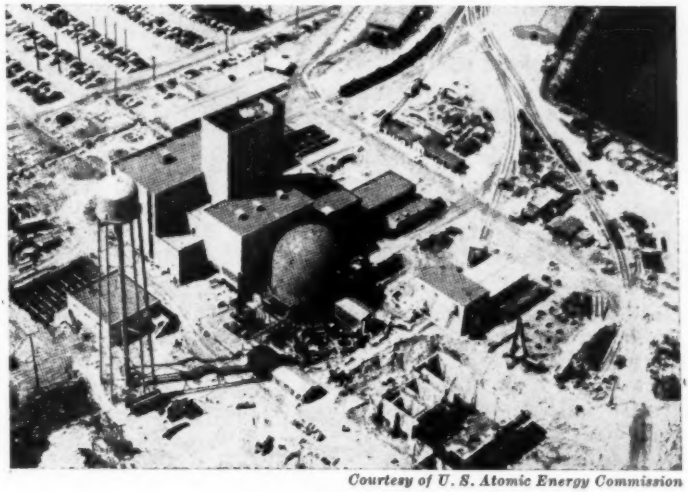
—LEWIS CARROLL

From the outset, Reuther and the unions had contended that the AEC had violated its own rules and regulations, and the Atomic Energy Act of 1954, in granting a construction permit to PRDC. At the time of the Circuit Court decision, more than fifty million dollars had been spent by the utility group in the erection of this fast breeder power station. The unions, at the time they filed the petition to intervene in August, 1956, contended: (a) the "conditional" construction permit was issued without any formal hearing before the AEC on the question of whether or not there were "reasonable assurances" that the health and safety of the public might be endangered; (b) that the AEC supressed and disregarded a report on the reactor safeguards committee which had stated that there was insufficient information available then to give assurance that the PRDC reactor could be operated at the site selected, without public hazard. The safeguards committee, said the union, had also doubted that the information would be available before actual operation. The other objections dealt with the experimental nature of the machine, and the financial capabilities of the Power Reactor Development Company.

The unions claimed a right to intervene in this matter by reason of the fact that any hazards, or possible hazards, would adversely affect their members, their property, and their collective bargaining agreements. It seems quite clear now that the AEC was very reluctant to grant any public hearing to the union, or any one else in this case. The fact that damaging statements were supressed by the AEC is some indication of their perspective. The full text of the suppressed report of the Reactor Safeguards Committee had been labeled "Administratively Confidential" and it would seem that this label of pseudo-secrecy was unjustified.

At the time the unions were allowed to intervene, and the report was released for publication, Senator Clinton P. Anderson, then Chairman of the congressional Joint Committee on Atomic Energy, issued a statement:

> "I am delighted that the UAW has won the right for an open hearing in this case. The UAW and associated unions should be congratulated for performing a public service in bringing about full public examination of the safety and other factors affecting employees and the general public. I feel sure that all parties will participate in the hearings in such a manner as to help, rather than hinder, the Government's atomic power program.



Courtesy of U. S. Atomic Energy Commission

AIR VIEW OF PRDC PLANT

I am particularly pleased that the AEC has finally released publically the full text of the safety report which my colleagues and I in the Joint Committee *have tried so hard* to make public."[3]

Senator Anderson said that he had received a letter from the Commission dated October 9, 1956 in which it was admitted that the "Administratively Confidential" label was a "mistake."

* * * * *

We Told You So, Too!

"Twinkle, twinkle, little bat!
How I wonder what you're at!"

—LEWIS CARROLL

On November 16, 1956, the editors of the *Wall Street Journal* felt called upon to add their comments. Noting that the PRDC hearings would be the first "full fledged" hearings before a government agency on the safety aspects of the construction of a reactor in an inhabited area, the *Journal* said:

"But the answers depend not only upon the judgment of the scientists and technicians as to the hazards, if any, but also on the public's judgment as to what hazards people are willing to accept. If people are not willing to live with *some* hazards in or-

[3] Press Release from the office of Senator Clinton P. Anderson, dated October 10, 1956.

der to progress we would not be living without steam engines or the airplane."

The *Journal* explored the implications of the AEC plan "to shut the doors on at least part of the testimony." Even if security clearances were given to certain of the participants who could qualify, said the *Journal*, the public and the inhabitants nearest to the proposed reactor would probably know none of the details.

> "So there it is. A government agency is proposing to make a decision on a matter of public policy, a *political* decision in the broadest sense of that phrase, while *hiding* some of the facts on which the decision must be based."

The *Wall Street Journal* pointed out also that "the main argument is between the private power companies who want to undertake the project and some labor union officials, led by Walter Reuther, who want to *block* it. The argument is all mixed up in the public-versus-private power fight. The AEC says it will decide the matter on a *scientific* basis. But the public is likely to have to take its decision purely on faith."[4]

Now four years later, it is not apparent that Walter Reuther has attacked any *other* reactor projects merely because they are financed by private capital, and it is apparent that the Circuit court did not feel that the AEC had made its decision on a *"scientific"* basis. The public might have taken the decision on faith but the court was not so inclined.

If the *Wall Street Journal* adequately reflected the philosophy of 1956, it indicated that there was serious doubt that the cloak and geiger routine was necessary because of the red Russians. "Perhaps the public is satisfied to have matters conducted that way, either out of disinterest, or fear," said the *Journal*, "but at least people ought to understand the precedent that will be set. If this practice continues, we are allowing a political agency made up of political appointees to make political decisions of the utmost importance with-

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[4] According to a written report furnished to us by Attorney Frances Freeman Jalet, who was an observer at the oral argument of the PRDC case before the members of the Commission in May, 1959, Mr. Claytor, counsel for PRDC, stated that the presence of the United Auto Workers represented an "all out" effort by Labor to stop the project. Benjamin Sigal, counsel for the unions, denied that the unions wanted to stop the project *"if it was safe."*

Organized Labor may indeed desire, as a matter of policy, "cheap" power. If the source of "cheap" power is the TVA, the cooperative, or some other form of public power, it can hardly be expected that the unions will support private utility companies which oppose "cheap" power. Labor has not fought reactors *per se*, many reactors are in some stage of planning or construction and there is no indication that Labor desires to interfere merely for the sake of interference, or because the projects will not lower power costs.

The Labor movement has consistently sought to protect the public, as well as its own members, from hazardous business enterprises. One example of this was the resolution passed at the annual convention of the American Federation of Labor in 1934 wherein the AFL noted that the Federal Food and Drugs Act of 1906 "has proved to be a very definite protection to the consumer of foods and drugs against physical injury and economic loss." The resolution went on to note that "the passage of time and its accompanying revolution in sales methods have introduced new dangers to the consumer," and concluded with a recommendation passage of the so-called "Tugwell Bill" which outlawed false claims and set up more severe penalties for violation of food and drug laws.

This action of the labor movement in the field of consumer protection from quackery, poisoning, and fleecing, is only one of many instances where the voice of the unions has been heard in behalf of the public as a whole.

We do not say that the unions were not, and are not seeking, as a national policy, to encourage public power. We do say that the PRDC case is not to be reduced to a mere tiff between big labor and "these giants of industry" in the public vs. private power battle.

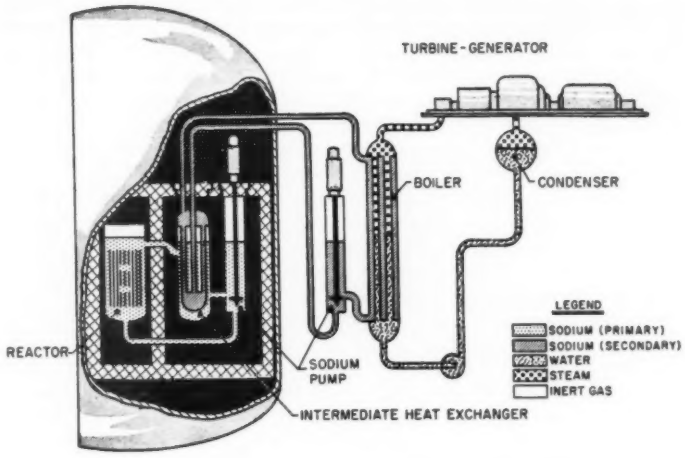

DIAGRAM OF NUCLEAR POWER PLANT

out any way to bring public judgment to bear on the judgment of those officials."

The warning issued by the *Wall Street Journal* in 1956 is one which deserves serious consideration. History will show that the AEC first paid real heed to this warning in 1959, and that it may be 1965 before there is a general awareness that our atomic energy economy may suffer far more from phoney secrecy and real stupidity than from the prying eyes and ears of the Russians.

No News is Good News

"The moon was shining sulkily,
Because she thought the sun
Had got no business to be there
After the day was done—
'It's very rude of him,' she said,
'To come and spoil the fun.'"

—LEWIS CARROLL

The PRDC case was assigned Docket No. F-16, and the file soon became cluttered with motions and other lawyers' papers dedicated to the specifications of the issues. Benjamin C. Sigal of Washington acted for the intervenors; Covington & Burling of Washington, and Miller, Canfield, Paddock and Stone of Detroit, acted for PRDC, and James L. Morrisson of Washington, then a member of the staff in the AEC, Office of the General Counsel, acted as "trial coun-

sel" for the Commission. Having no hearing examiner of its own, the AEC was obliged to "borrow" one from another Federal agency. Contrary to usual procedure, the "guest" examiner was not authorized to make any decision and Mr. Morrisson later stated: "consequently the process of decision was significantly delayed and the examiner was less willing than he otherwise might have been to exclude irrelevant or repetitive evidence. AEC now has its own examiners and is not likely again thus to limit his power."

In the eyes of some, the AEC and the Power Reactor Development Company were cast in the role of arch-conspirators and the unions appeared on the scene as knights in shining armor. Sir Walter Reuther and his esquires were not quite sure that they could enter the tournament on equal terms with the black knights of the atom.

Mr. Morrisson later said that the hearing "came as a surprise to people in and out of AEC. It required a departure from the rather informal methods of staff consideration of reactor safety problems that the AEC had been using." Another feature of the hearing, which produced a stenographic transcript of 3,919 pages, and 83 exhibits,[5] was "the interesting spectacle of a Hans Bethe or a Harvey Brooks kept on the witness stand for days of interrogation by lawyers none of whom could pass a college freshman course in physics." Another statement by Mr. Morrisson strikes a familiar chord. He noted that once the hearing got underway, it received little notice from Congress or the *press*. "But this very lack of publicity," said Morrisson, "can be interpreted as a measure of the restoration of public confidence the hearing accomplished. Once it became evident that nothing was being concealed, and that the facts provided a rational basis for letting the project go ahead, *there was no longer any news story in the case. Thus, no news is good news.*"[6]

Mr. Morrisson made his remarks after he had resumed private practice and *before* he could have been sure that there would be any appeal. His feelings were shared generally by all who were concerned with the promotion of the PRDC reactor. Almost no one even dreamed, back in July, 1959, that the court would ever reverse the AEC, and the decision of May 29, 1959 was accepted by the Commission and by the industry as the last word.

In his post-mortem of July, 1959, Mr. Morrisson said that the hearings demonstrated that "AEC Secrecy was not an impediment to the use of public hearing procedures. The union intervenors sought to make secrecy a major issue in the case by demanding access to classified documents without obtaining security clearances." There was no intimation that the union lawyers could not obtain such clearances; they apparently decided that they would not seek them, and their decision seems to have been fully justified. Mr. Morrisson

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[5] In the preparation of this article, *we did not read the transcript of the hearings.* We did read the briefs of the parties before the AEC and the Circuit Court, some of the exhibits were reviewed, and a large number of insufferably dull documents were inspected. Other source material is identified here. References to contents of the record are taken from appropriate quotations set forth in copies of pleadings, briefs, or reports of the hearings found in secondary sources. Under the circumstances, we presume the accuracy of quotations, but feel that some sort of caveat should be recorded here.

[6] The article by Messrs. Morrisson and Garrick entitled: "What We Learned from the PRDC Case" appears in *Nucleonics*, Vol. 14, page 60, July, 1959.

contended that the only secret *"on which a need for such access was demonstrated,"* was the price of plutonium. This secret was revealed but said Morrisson, "Although the unions continue to urge it, they have made no persuasive showing of prejudice from their lack of access. However, it may be too early to be sure that secrecy will not present a problem in any civilian reactor case that may arise."

In their brief before the AEC, the union contended that "The Commission denied Intervenors a fair hearing in warning con-

sultants of the Commission that they may be subject to criminal prosecution under conflict of interest laws if they testified for the parties in this case, other than AEC." Mr. Sigal based this point of error, at least in part, on certain correspondence between himself, as counsel for the unions, and the AEC. The first letter was dated November 5, 1956 from H. L. Price, Director of the Division of Civilian Application of the AEC. The significant contents are as follows:—

> "It is recognized that parties to formal hearings frequently will want to call employees and consultants of the Commission and employees of Commission contractors as witnesses in the hearing. *There is no objection* to such employees and consultants appearing as witnesses at a hearing. However, responsible Commission officials will have to make sure that the time of AEC employees and consultants is not taken up to an extent that it interferes *unduly* with the Commissions program. Furthermore, it should be recognized that Commission contractors have the right to supervise their employees within established personnel policy."[7]

The real meaning of this letter is still rather uncertain, and is made more uncertain by another letter of December 14, 1956, again from Mr. Price, in which it was stated that Commission employees

[7] "Post Hearing Brief of Intervenors," AEC Docket No. F-16, page 22.

and consultants might possibly become involved in conflicts of interest in violation of law. The Commission therefore "modified" the position it had taken in the November 14th letter and said that Commission employees would not appear voluntarily, for anyone but the AEC, at the hearing.

> "Commission consultants have been advised that the Commission interposes no objection to their voluntary appearance on behalf of any party to a formal hearing of the Commission. This is in recognition of the fact that Commission consultants only provide their services to the Commission on a part-time basis and the Commission does not feel it will be justified in imposing controls over activities when they are not in the employ of the Commission. Of course, to the extent that such consultants voluntarily appear as witnesses to any party, they do so in their private capacity and not as representatives of the Commission. However, the Commission has advised its consultants that voluntary appearances might involve a conflict of interest with their activities as consultants to the Commission and that they may wish to consult private counsel in this respect."[8]

A third letter of January 25th, 1957 from Mr. Fields, then general manager of the AEC, was sent to Sigal in response to his protest to AEC Chairman Strauss that the conflict of interest warning will "whether intended or not, have an intimidating effect on AEC employees and consultants." This time the AEC pointed out that it did not want the unions to hire any AEC experts. The position was not, admittedly, stated quite as succinctly. Sigal was further advised that the AEC wanted its consultants to realize that one does not bite the hand that feeds you, and if one tries, there might be "violations of the conflict of interest laws." Mr. Fields made it clear that the "testimony of AEC employees will be equally available to any party's cause." But the very vital testimony of AEC consultants would be unavailable to the union. It is a fact, according to Mr. Sigal, that not one single "outside" expert testified for the union. The tactics of the AEC were branded by the unions as "intimidating prospective witnesses for the Intervenors" and the letter from Mr Fields was termed by union lawyers "a disingenuous and devious rationalization." Although motions were filed by the union for access to classified information (without security clearance) so that all relevant information, documents, and materials could be inspected by the lawyers, the motions were denied, at least in part.

In its brief after the administrative hearing the union pointed out that the final motion specified some 73 specific documents they claimed they needed to prepare their case. It was also claimed at this juncture that the information dealt only with "civilian applications of atomic energy" and that the national security was involved not at all. The union lawyers asserted that this denial of access was a violation of the First and Fifth amendments of the U. S. con-

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[8] "Post Hearing Brief of Intervenors," AEC Docket No. F-16, page 23.

stitution since it limited them in the conduct of their case. It should also be pointed out that even if the lawyers had been given security clearance, there is no assurance that they would have been able to discuss the restricted data with their clients, prospective witnesses, or others who would be interested. Counsel for the union felt that the denial of access by the commission was "above the rule of reason" and was "little short of fantastic."

* * * * *

182 And All That . . .

"Tell him you'll stand no sort of trick:
Then if he leers and chuckles,
You just be handy with a stick
(Mind that it's pretty hard and thick)
And rap him on the knuckles."

—LEWIS CARROLL

The precise legal point involved in the PRDC case is found in Section 182 of the Atomic Energy Act of 1954 (68 Stat. 919, 42 U.S.C. 2001, et seq.) under the heading of "License Applications." The pertinent language is as follows:—

> "(a) . . . In connection with applications for licenses to operate production or utilization facilities, the applicant shall state such technical specifications, including . . . the place of use . . . and such other information as the Commission may, by rule or regulation, deem necessary in order to enable it to find that the utilization or production of special nuclear material . . . will provide adequate protection to the health and safety of the public. Such technical specifications shall be a part of any license issued. . . ."
> (42 U.S.C. Sec. 2232(a).)

Authority for the issuance of licenses is found in Sec. 104 (b) of the Act (42 U.S.C. Sec. 2134) and it is recognized in 104(b) that the AEC has an obligation to "protect the health and safety of the public."

The principal and most hotly contested legal argument in the PRDC matter was born of the marriage of Sec. 185 of the 1954 Act, (42 U.S.C. Sec. 2235) to certain AEC regulations which dealt with a so-called "provisional" or "conditional" license to construct a reactor or other facility.

The law itself does not speak of "provisional" licenses; it is necessary to resort to the regulations in order to find any basis for the existence of such an animal.

Sec. 185 of the Act is labeled "Construction Permits" and lays down the basis for the issuance of such permits. There is ample

provision in this section of the Act for amendments to the license application before actual *operation* but the meaning of the final sentences is what gave birth to this amazing proceeding. The pregnant words are these:

> "Upon the completion of the construction . . . and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this chapter and of the rules and regulations of the Commission, and in the absence of any good cause being shown to the Commission why the granting of a license would not be in accordance with the provisions of this Act, the Commission shall thereupon issue a license to the applicant. *For all other purposes of this Act a construction permit is deemed to be a 'license.'* "

The "provisional" construction permit is authorized by a regulation of the Commission, Section 50.35 (Part 50, 10 C.F.R.) which allows an extension of time for the applicant to provide technical information where the data is initially unavailable "because of the nature of a proposed project." The regulation also states:—

> "If the Commission is satisfied that it has information sufficient to provide reasonable assurance that a facility of the general type proposed *can be constructed and operated* at the proposed location without undue risk to the health and safety of the public, and that the omitted information will be supplied, it may process the application and issue a construction permit on a *provisional basis* without the omitted information subject to its later production, and evaluation by the Commission that the final design provides reasonable assurance that the health and safety of the public will not be endangered."

Section 50.45 of the Commission regulations (10 C.F.R.) is entitled: "Standards for Construction Permits" and provides that (so far as material) . . . "An applicant for a license . . . who proposes to construct . . . a production or utilization facility will be initially granted a construction permit if the applicant is in conformity with and acceptable under the criteria of Sections 50.31 through 50.38 and the standards of Sections 50.40 through 50.43."

Section 50.40, "Common Standards" provides that among other things considered in determining whether or not a *"license"* will be issued, the Commission "will be guided by" considerations including facts supplied by the applicant which "provide reasonable assurance that the applicant will comply with the regulations in this chapter including the regulations in Part 20, and that the health and safety of the public will not be endangered. Other considerations are that the applicant be technically and financially qualified and that the issuance of the "license" will not "in the opinion of the Commission be inimical to the common defense and security or to the health and safety of the public."

* * * * *

If anyone has been successful in winding his way through this maze of words and numbers, he is to be congratulated, but from the documents in the case it is clear that the union contended:—

> The issuance of a construction permit was, without more, the issuance of a license to operate; it is a ONE step procedure.

The Commission contended otherwise, it was the interpretation of the AEC that:

> The issuance of a license is a TWO step procedure. The first step is the construction permit, or the "provisional" construction permit. The second step is the issuance of the actual operating license.

Enter the Legislative Branch

The precise position of the AEC was stated to the Joint Committee on Atomic Energy on February 16, 1960 by William F. Finan, Assistant General Manager for Regulation and Safety. Finan said:—[9]

> "Under current regulations the criteria for the issuance of a *construction permit*, briefly stated, are first, a reasonable assurance that the facility of the general type proposed can be constructed and operated at the proposed location without undue risk to the health and safety of the public. You will note that *there is an inference* in the current regulation that the problems involved in safely operating the facility can be adequately reviewed and taken into account at the time the construction permit is issued. Experience has indicated that it is asking both the applicant and the Commission, and for that matter the Advisory Committee on Reactor Safeguards (ACRS), to go farther than technology actually permits at this time.
>
> "So the criteria in the proposed regulations is reasonable assurance that the proposed location is suitable from a safety standpoint for a facility of the size and general design concept proposed."

Mr. Finan went on to say that in the proposed amendment, *which was proposed after the AEC had filed its brief in the Circuit Court*, would "remove" the element in the existing regulation (50.35) that "this reactor can, in fact, be operated as contemplated" at the time the construction permit is first issued. The result of the proposed amendment would allow the AEC to issue a permit to erect a reactor at a designated site, but leave the question of whether it could be operated so that there would be no undue hazard to lives and safety until it came time to issue a license to operate. Mr. Finan presented his message with two charts as follows:

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[9] Hearings before the Joint Committee on Atomic Energy, 86th Congress (2nd Sess.) February, 1960, "Development, Growth, and State of the Atomic Energy Industry," held pursuant to Section 202 of the Atomic Energy Act of 1954 (hereinafter referred to, for quite obvious reasons, as 1960 "202" Hearings), at page 105.

Old Provisional Construction Permit Criteria	New Permit Criteria
1. Reasonable Assurance that a facility of the general type proposed can be constructed and operated at the proposed location without undue risk to the health and safety of the public.	1. Reasonable Assurance that the location is suitable from a safety standpoint for a facility of the size and general design concept proposed.
2. Reasonable Assurance that technical information required to complete the application will be supplied by the applicant.	2. The major features or components on which further research and development work is needed to assure safety of the facility have been identified.
3. The applicant is technically and financially qualified to engage in the proposed activities.	3. Same.
4. Issuance of the construction permit would not be inimical to the common defense and security or to the health and safety of the public.	4. Same.
5. None.	5. Applicant will conduct a research and development program to investigate the unresolved safety questions.[10]

* * * * *

Not Being a Lawyer . . .

"He said, 'I'll gladly tell you how,
And also tell you why;
But (here he gave a little bow)
You're in so bad a temper now,
You'd think it all a lie.'"

—LEWIS CARROLL

After Mr. Finan made his statement and presented his chart, Senator Anderson, Chairman of the Joint Committee, wanted to know if it was proposed to "drop out all reference to the health and safety of the public." On being assured (apparently) that No. 5 in the regulation would take care of safety, this discussion took place:—[11]

Chairman ANDERSON. "Why don't we just apply this to the PRDC case. In item No. 2, at Laguna Beach, you would say there are these factors that need to be identified and we identify them as follows: No. 1, they haven't done this; 2, they have to test this; and so forth and so on. Then you get down to the fifth requirement and say the applicant will conduct a research and development program to investigate the unresolved. He doesn't have to solve it. He has to look at it."

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[10] 1960 "202" Hearings, page 677.

[11] 1960 "202" Hearings, page 106.

Mr. FINAN. "If he does not solve them, he will not get an operating license."

Chairman ANDERSON. "Where does it say that?"

Mr. FINAN. "If it doesn't say it on this chart, Mr. Chairman, it is implicit in everything I have said."

Chairman ANDERSON. "If it is implicit, why not say it?"

Mr. FINAN. "The regulations take care of that."

* * * * *

Mr. RAMEY (Executive Director of the Joint Committee). "Under two, isn't there an implication in your present regulation that in order to grant a construction permit now there must be reasonable assurance that the research and development program will provide adequate information to solve the safety problems of the reactor. Isn't that missing from your revised one?"

Mr. FINAN. "No, I don't believe it is."

Chairman ANDERSON. "In other words, that this safety program will be successful.

You say not, it isn't, and I would guess, yes, it is. This would look, on the face of it, as if this is a way of getting around the PRDC case, that they don't have to come up and cure things. All they have to do is take a peek at them."

Mr. FINAN. "No, sir. The fact is that PRDC is now constructing under the present regulation. The issue is what is required to get an operating license."

Chairman ANDERSON. "They are constructing, *but somehow they are in court.*"

Mr. FINAN. "Yes."

Chairman ANDERSON. "This would say you can't take them into court because they are doing what you say. They have figured out the things that are dangerous, and they have agreed to investigate them. They have not agreed to solve them. They have agreed to investigate them. So give them the permit. Why hold them back? They have agreed to do all the things that the criteria call for. It calls for an investigation."

Mr. FINAN. "I don't know how far we can go here in talking about a matter that is under litigation."

Chairman ANDERSON. "I don't either, but, not being a lawyer, I don't have any hesitation."

* * * * *

In previous testimony John S. Graham, a member of the Commission had said that there was some question of safety still in regard to the PRDC reactor. "The fact that they have gone ahead and put many millions of dollars into it, it would work a tremendous hardship on them if this was found to be unsafe. And yet, the protection of the people might cause just that sort of thing to happen."

Graham put his finger on another very vital point:

"This granting of a construction permit, and then, finally granting of an operating permit, it seems to me, causes private industry to take a terrific gamble. The *pressure becomes so great to grant* the operating license, because of the financial investment that I am wondering if a body, which in this case is not a separate body, but a part of the body that granted them the first steps in their procedure, is not put in a very bad position, to deny them at the last moment in the public interest an operating license."[12]

* * * * *

The testimony of Mr. Finan, together with his charts, and the caveat of Commissioner Graham, seem to bring out of the morass of words and section numbers a clearer picture of the actual feelings of the AEC as to the granting of construction permits. In Mr. Finan's statements, there is a certain lack of complete frankness but it is clear that the proposed amendment of Section 50.35 of the Commission's regulations was indeed an attempt to give official sanction to the practices about which the unions complained in the PRDC case.

In short, it seems clear that the AEC did *not* in the case of PRDC make a finding, *at the time the provisional construction permit was issued,* that the PRDC reactor could be *operated* without undue risk. It is also quite clear that the "new" criteria on Finan's chart were employed even though the existing regulation, and the basic law failed to authorize the application of any "new" criteria.

In the final AEC decision of May 29, 1959, which was the subject of the appeal, it was the finding of the Commission: "22. The Commission finds reasonable assurance in the record, *for the purposes of this provisional construction permit,* that a utilization facility of the general type proposed in the PRDC application and amendments thereto can be constructed and operated without undue risk to the health and safety of the public."

In its decision, the Circuit Court said that: "This is *not* a finding that a facility can be operated there without undue risk." It was only a finding for the purposes of the "provisional" construction permit.

The AEC had found (in a decision on December 10, 1958) that when the original permit was issued that there was "reasonable assurance" that PRDC's proposal "can be constructed *and will be able to operate* at the location proposed without undue risk to the health and safety of the public." The Circuit Court found that there had been some sort of revision in thinking by the AEC between December 10, 1958 when the tentative decision was issued, and May 29, 1959, when the final decision was issued.

The Commission also said in the final decision: "The degree of 'reasonable assurance' with respect to safety that satisfied us in this case for purposes of the *provisional* construction permit would not be the same as we would require in considering the issuance of the operating license." Actually the AEC made the flat statement that it had not been "positively established" that the fast breeder

[12] 1960 "202" Hearings, page 103.

reactor type proposed by PRDC could be *operated* without a "credible possibility of releasing significant quantities of fission products to the environment. . . ." But it also found that there was assurance that the thing could be built in such a way that no such tragedy would be likely.

As we have said before, the Commission seems to have been of the opinion, until June 10, 1960, that it was perfectly O.K. to have a neck and neck race between the construction crew and the research and development team with the hope that at the photo finish, the necessary findings on safety would have been made. And as we also said before, it is mighty tempting "after putting out all that moola, to see how she works."[13]

* * * * *

Around and Around We Go

"You don't know how to manage Looking-glass cakes," the Unicorn remarked! "Hand it round first and cut it afterwards."

—LEWIS CARROLL

We have attempted to reduce the differences between the unions and the Power Reactor Development Co. (and the AEC) by citing the position of the unions that the grant of a right or privilege to *operate* a power reactor was a *one-step* procedure; and we have said that the philosophy of the AEC and the reactor developers was that it is a *two-step*. At times it seems a little like a waltz.

Reverting to basic statutory authority, we again turn to Section 185 of the Act of 1954 (42 U.S.C. Sec. 2235) where it is provided that a "construction permit is deemed to be a 'license' " to operate when the reactor is completed according to previous plans and requirements. It is a "license" (to operate). . . . "For all other purposes of this Act. . . ." If private capital entered upon a reactor project without the assurance that, if it followed all the rules and regulations, it could operate the reactor upon completion, the situation would be utter chaos. Certainly no party to the PRDC case ever contended that the law could be interpreted in a manner which would require the investors to risk their capital in a project without solid assurance that the right to operate was guaranteed by law.

The "one-step" theory of the unions simply means that the proper interpretation of Section 182 of the Act (42 U.S.C. 2232) requires the AEC to find *at the time the construction permit is issued* that there will be adequate protection to the health and safety of the public. Section 185 which authorizes construction permits requires that the applicant and the AEC must comply with Sec. 182, and all other sections of the Atomic Energy Act of 1954. The important qualification of the regulations of the AEC (Sec. 50.35) does allow a "pro-

[13] See: M.L.Q., July, 1958, Vol. XLIII, page 75.

visional" construction permit, as we have seen. But even in the case of a provisional construction permit, the unions contended that the AEC could not issue authority to begin the project unless:—

> "the Commission is satisfied that it has information sufficient to provide reasonable assurance that a facility of the general type proposed can be constructed *and operated* at the proposed location without undue risk to the health and safety of the public."

Thus even in the case of a "provincial" construction permit, said the unions, the findings that the reactor could be *operated* safely must be made *at the time the provisional construction permit is issued.*

The AEC and the applicant persisted in maintaining the position that if it was found that the public safety would not be risked *during the construction period,* a "provisional" construction permit could be issued. The second "step" was a review of all the research and development data and an ultimate finding by the AEC, after completion, and before actual operation, that the reactor could *operate* safely.

* * * * *

To ascertain the meaning of the language of Sections 185 and 182, the union lawyers and the Circuit Court resorted to the legislative history of the Atomic Energy Act of 1954. It was found that during Senate debate on the bill Senator Humphrey had proposed (and then withdrew) an amendment to Section 185 which would have added a requirement that "no construction permit shall be issued by the Commission until after the completion of the procedures established by Section 182 for the consideration of applications for licenses under this act." (100 Cong. Rec. 11566 (1954); Legislative History of the Atomic Energy Act of 1954, Vol. III, p. 3759; Vol. I, p. 733.)

Senator HUMPHREY. "The purpose of the amendment when it was prepared was to make sure that the construction of a facility was not permitted prior to the authorization of a license, because had that been done what it would have amounted to would be getting an investment of a substantial amount of capital, which surely would have been prejudicial in terms of the Commission issuing the license. In other words, if the Commission had granted the construction permit for some form of nuclear reactor, and then the question of a license was not fully resolved, surely there would have been considerable pressure, and justifiably so, for the Commission to have authorized the license once it had authorized the permit for construction.

"The chairman of the committee tells me he had modified certain sections by the committee amendments to the bill, of which at that time I was not aware. The Chairman indicates to me that under the terms of the bill as amended, the construction permit is *equiva-*

lent to a license. In other words, as I understand, under the bill a construction permit cannot be interpreted in any other way than being equal to or part of the licensing procedure. Is that correct?"

Senator HICKENLOOPER. "The Senator is correct. . . . A license and a construction permit are equivalent. They are the same thing, and one cannot operate until the other is granted.

The same is true with reference to hearings. Therefore we believe, and we assure the Senator, that the amendment is not essential to the problem which he is attempting to reach."

After a further discussion on other sections of the bill, the colloquy between Senators Hickenlooper (the manager of the bill) and Humphrey continued:—

Senator HUMPHREY. "In other words, the revised sections on judicial review and the revised section 182 on license application all apply directly to construction permits?"

Senator HICKENLOOPER. "Yes."

Senator HUMPHREY. "With that statement, Mr. President, I withdraw my amendment. The only purpose of the amendment was to clarify that section. I am grateful to the Chairman for having done it before the amendment was considered."

* * * * *

The Circuit Court said that the proper interpretation of this colloquy, in its opinion, was that there must be a finding *at the time the construction permit is issued* that the reactor (or other facility) can be *operated* at the proposed location "without undue risk to the health and safety of the public." The AEC apparently interprets the colloquy to mean that only the "procedural safeguards" of notice, hearings, appeals, etc., are involved. Said the Circiut Court: "We cannot so understand it and cannot suppose the Senate so understood it."

Perhaps it is unstated in any of the papers in this case, but if the risk capital is to be protected by a guaranteed license, when construction is completed, is it not a fair interpretation to contend also that the same guarantee should apply to the public? Should not their safety, as well as the risk capital, be guaranteed from the outset? The AEC says it *is* guaranteed, if not at the outset, then at least when the reactor is ready to operate. But lead us not into temptation.

"At the very least," said the Circuit Court, "it is doubtful whether the Commission's construction of the Atomic Energy Act is correct. The possibilities of harm are so enormous that any doubt as to what findings the Act requires, and any doubt as to whether the Commission made such findings should be resolved on the side of safety."

Two Against One—A Dissent

"The thing can be done," said the Butcher, "I think";
The thing must be done, I am sure.
The thing shall be done! Bring me paper and ink,
The best there is time to procure."

Justice Burgher wrote a dissent. It was his position that "the Commission has issued only a provisional permit to build a plant, not to operate it." He felt that the court was dealing with an area involving as much scientific uncertainty as might be expected in this new world of atomic energy. Justice Burgher felt that the Commission should be allowed to proceed "step by step" and it was proper and sensible to issue the construction permit as the first step.

Justice Burgher suggested that the majority of the court was telling the AEC that it had made an *unwise* decision, and that the statement by the majority that there was a possibility of a "nuclear disaster" was directly "opposed to the finding" of the AEC. Justice Burgher also said that the majority "also goes beyond the established limits of judicial review" when it says:—

> "The economy cannot afford to invest enormous sums in the construction of an atomic reactor that will not be operated. If enormous sums are invested without assurance that the reactor can be operated with reasonable safety, pressure to permit operation without adequate assurance will be great and may be irresistible."

We feel that Mr. Justice Burgher has missed the point here. From this remark, it would appear that he believed the majority rested their decision, at least in part, on what the economy could "afford."[14] The statements in the dissent that "these giants of American industry" which formed PRDC are willing to take a risk of the "small

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[14] The prospects for competitive nuclear electric power by tomorrow morning, to run the toaster, are none too bright. The expected capital costs for a sodium cooled fast breeder reactor, such as PRDC, are $374 per Kilowatt Electric, or 7.49 mills per kilowatt hour for fixed charges. To the fixed charges it is necessary to add the fuel cycle cost, operation and maintenance costs, and nuclear insurance.

In reports issued by the AEC in early 1960, on the "Civilian Power Reactor Program," Document TID-8516, Parts I and II, it is projected that within *ten* years, the figures given above may be valid. In "Part II of the report at p. 63, the following table appears:

Potential and Program of Fast Breeder Reactors
(300,000 watts—electric fast breeder)

In Mills	Current Status	Potential
Fixed charges	5.10	4.43
Fuel cycle cost	7.10	1.99
Operation and maintenance	.79	.79
Insurance	.26	.25
	13.25	7.46

To reach the potential of 7.46 mills per kilowatt hour the AEC estimates that there must be an additional investment of $322 million between now and 1970 for fast reactor development *only*. Present costs of conventional coal burning power stations range anywhere from 6.00 to 11.14 mills per kilowatt hour, and this includes *all* costs. Since no fast reactor has ever operated, it is impossible to say what the cost will be for certain. The same AEC report states that the costs for a pressurized water reactor (such as the Yankee Atomic at Rowe, Mass.) are now 9.28 mills per kilowatt hour and this may be reduced to 7.80 mills by 1970. This last assessment is certainly very optimistic. It would be a little more accurate to give the current cost at between 13 and 14 mills and the prospective cost as 11 mills if all goes well.

investment" of forty or fifty millions, when the nation has invested billions, seems both gratutious and somewhat afield. The real point is that "these giants" and their promoters should not have the psychological advantage which the law seems to forbid them. In addition, Justice Burgher says nothing of the limited liability of PRDC. He does agree that "large investment in machines might conceivably exert a subtle influence on the ultimate grant of an operations permit."

> "But I cannot join in the suggestion that members of the Atomic Energy Commission who have assumed obligations under oaths as binding as ours would permit an operation dangerous to the public because 40 or 50 million dollars is invested in brick, mortar, and steel by men who knew *from the outset* that they were engaged in a scientific gamble."

The closing two paragraphs of the dissent deserve full consideration:

> "The essence of the majority action is found in its acceptance of the idea that once the Commission has permitted PRDC to invest its millions in the plant they are 'bound' or 'likely' to relax their notion of what is safe or dangerous in order to bail out the investors.
>
> "I emphasize that I cannot for a moment believe the sponsors of PRDC are so naive that they would think their investment of these millions is not speculative just as is most research. Nor can I believe they think that any amount of invested capital will persuade the Atomic Energy Commission to make a finding of safety which is not supported by substantial scientific evidence. It is entirely possible that PRDC might find itself the owner of a 50 million dollar scientific 'white elephant' if, after completion of construction, it cannot satisfy the safety standards of the statute. Should that be the case, it will be simply one of the unproductive steps in what promises to be a program to open to mankind sources of power undreamed of only a few years ago."[15]

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[15] It had been assumed that our British friends were going all out to produce atomic electric power, much more so than we. At the world power conference in Madrid on June 7, 1960, Sir Christopher Hinton, chairman of Britain's nationalized electric industry, said that although progress with nuclear power has been as great in the last seven years as was the case with the first 50 to 100 years of coal, there is cause for conservatism.

On June 21, 1960, the British Minister of Power issued a White Paper on nuclear power announcing that five to six million kilowatts of electrical capacity, which were to be installed by 1966, will not be delayed until at least 1968. The Minister, Mr. Wood, said that the point at which nuclear power could compete with conventional fuel is going to be further in the future than expected. By revising their plans the British hope to save $250 million dollars in the next seven years. It was also announced that the British Atomic Energy Authority had lost "some millions" in making preparations to supply and reprocess nuclear fuels for reactors which have been shelved for the present.

The chief reasons for pessimism are these: (1) There is an over-production of conventional fuels such as coal and oil. (2) Large and apparently limitless sources of oil and natural gas are being developed in Arabia and elsewhere. Hydroelectric power is being pushed by many countries, notably in Russia. (3) It has been demonstrated by the Suez thing that England and Europe need not necessarily depend on Middle East Oil. (4) Even uneconomic coal mining has been continued for social and political reasons in Britain. (5) Interest rates have risen. (6) Demand for plutonium (which was to be sold back to the government) had been reduced. (7) There have been rapid advances in coal burning power station techniques.

Despite this gloom in England, Dr. Frank K. Pittman, director of reactor research for the AEC told the Madrid conference that he felt the U.S. could do business by 1968 in high fuel cost areas, and that by 1980 nuclear power would be comparable in price with conventional power throughout the United States.

Cheap nuclear power is just around the corner . . . like (to use the beatnik vernacular).

The Problem of the Split Personality

In our criticism of this dissent, we would point out that there is no evidence known to us which would support a belief in the idealism and scientific detachment which Justice Burgher seems to find in the AEC. Throughout the PRDC controversy, and until some amendment to existing law effects a change, the Atomic Energy Commission is both the promotional and the regulatory agency of the federal government. The dual role of the AEC is no longer useful or expedient. It may be remembered that the British revised their nuclear philosophy after the disaster at Windscale and separated the promotional from the enforcement function. It was recognized that human beings are not capable of such scientific schizophrenia.

In the hearings on the development, growth, and state of the atomic energy industry held by the Joint Committee on Atomic Energy in February, 1960, Senator Anderson drew attention to this issue of bifurcated function. Commissioner John S. Graham had given testimony that the regulatory function of the AEC "will be a growing burden." Mr. Graham was "reluctant to say that it is the straw that broke the camel's back."

Mr. GRAHAM. "It seems anomalous in many respects to have us wearing a promotional hat and also a regulatory hat. At some point in time we try to draw the distinction of a cutoff point, where it goes to trial, if I may use that analogy, treating the hearing examiner as a Federal district court judge to take the evidence and render his opinion, and then it comes to us on appeal, if I may think about it in those terms."

Chairman ANDERSON. "As the Supreme Court from the U. S. district court?"

Mr. GRAHAM. "We try to think about it in those terms."

Chairman ANDERSON. "What I am getting to, Mr. Graham, is suppose that if in this country when they started to build transcontinental railroads there had been an agency whose job it was to develop a program for transcontinental transportation by railroad: land grants, engineering.

"You may recall how many surveys there were of routes to the Pacific. It runs into 15 or 20 volumes of big studies. Simultaneously, while the group was trying to promote, suppose they had also been the ICC, the regulatory board to decide what rates the railroads might charge, how many flagmen and switchmen and so forth they were going to have, what sort of rules they were going to abide by.

"Here they would be pushing it ahead with one hand and holding back with another. I think that would have been regarded as sort of ridiculous.

"I wonder if there is not going to come a point in the work of the Commission at which the regulatory and licensing functions might be split off from those functions which deal with the development of isotopes in Antarctia, or some place of that nature.

"If some thought has been given to it, I would like to have it and I am sure the members of the committee would."

Mr. GRAHAM. "Mr. Chairman, I am sure all of us think about it from time to time. I believe you are forecasting, as you have done before in so many instances, that this time will come. I would not be prepared to say to you today that it is here.

"But to repeat, it is something that is in our minds just as it is in yours. I think sometime it is something that your committee and your staff and the rest of us should take another look at. You have not looked at it for, I believe, 2 years."[16]

* * * * *

What They Learned

" 'Tis a pitiful tale,' said the Bellman whose face
Had grown longer at every word:
'But now that you've stated the whole of your case,
More debate would be simply absurd.' "

—LEWIS CARROLL

In their memoirs covering the PRDC hearings, Attorney Morrisson and B. John Garrick, a nuclear physicist, set forth "What We Learned from the PRDC Case." The lessons were these:—

1. The hearing demonstrated that reactor safety issues can be handled by traditional administrative processes.
2. It assured public confidence in AEC's safety controls.
3. It confirmed the validity of AEC's construction permit procedures.
4. It contributed to technical information concerning fast reactor safety.

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[16] See 1960 "202" Hearings, pages 97 and 98.

In January, 1958, the committee appointed by the Prime Minister of Great Britain to examine "The Organisation for Control of Health and Safety in the United Kingdom Atomic Energy Authority" said:

"It has been pointed out to us that, since the Authority themselves design, build and operate reactors and act as consultants both to the Electricity Authorities and to industry, *they cannot claim to be disinterested on questions of the siting and design of privately-owned reactors*, however objective they may in practice seek to be. Since the Authority have a financial interest in the commercial exploitation of their own *research and development* work they cannot represent themselves as completely impartial arbiters on safety questions."

The committee noted that the Atomic Energy Authority had suggested an independent body "to license nuclear reactors designed, built or operated in the United Kingdom." It was recognized that the responsibility for "checking detailed design and construction and for surveying operating conditions will have to remain with the Authority for some years to come," but it was also found that "the only people competent to exercise the judgment required are members of the Authority's staff and it is not, in our view, possible at present to constitute a truly independent body.

"Nevertheless," said the committee report, "we recognize the delicacy of the Authority's position and agree their suggestion should be regarded as a long-term target. Private firms have already entered the reactor field and some form of public control will have to be introduced to ensure that proper health and safety measures will be taken. When this legislative gap has been filled, we consider that only the Authority will be able to give the advice required by Ministers on questions of reactor siting and design *until* knowledge becomes sufficiently widespread for a truly independent body to be established. This responsibility will probably continue for at least five years."

Command Paper No. 342, January, 1958

We are inclined to agree with the fourth statement. The report by these gentlemen, as might be expected, is an expression of confidence in the decision of the AEC which was reversed by the Circuit Court. There are several further points contained in the "What We Learned" report of Morrisson and Garrick:—

1. "the ultimate issue (in a case of this kind) is not one of technical judgment but of values; how great a risk of injury is 'undue'?"
2. "the original PRDC license application—like some others—was almost *wholly lacking* in environmental information. . . . Not until the hearing was well along did one begin to see environmental data integrated with the possible occurrences in the reactor, to show the relation of environmental conditions to public safety."
3. "in addition, the hearing stimulated research and development by both AEC and PRDC into fast reactor safety problems."
4. "on the basis of 'somewhat hazardous experiments' and 'unusual operating conditions' in a research fast reactor (EBR-1) and by reason of 'relative lack of experience' there were at least 'two major areas of uncertainty' concerning fast reactors."[17]
5. "the importance of these uncertainties was accentuated by the site selected, which is prone to temperature inversions that would prevent dissipation of a fission product cloud, should one be released."
6. "when AEC issued its original construction permit it could be said that neither the stability nor the melt-down problem appeared inherently impossible of solution, and that there were affirmative indications that favorable solutions would be found by substantial theoretical and experimental effort and by design features whose nature could not yet be identified."

It was the final conclusion of Messrs. Morrisson and Garrick that all of these uncertainties were *somewhat* clarified when the AEC made its tentative decision on December 10, 1958. They said that "substantially more evidence was available, and the scope and time schedule of further investigation had been increased and accelerated."[18]

It comes down to this: it sounded like a good idea; why not give it a try? As time went on some of the theories proved out. All the

[17] In the brief filed in behalf of the applicant before the AEC (page 60), the statement is made that a prototype of the proposed fast reactor was not "essential." Reference was made to the British fast reactor at Dounreay, Scotland, which would begin operation in September, 1960. In a report entitled: "Report of the Committee appointed by the Prime Minister to examine the Organisation of certain parts of the United Kingdom Atomic Energy Authority (Command Paper 338, December, 1957), it is said (at page 26) "we recommend the appointment of a Director of Dounreay because of the special difficulties arising from the size, *remoteness* and special functions of this site." At page 32, the committee said: "The activities at Dounreay are fundamentally *experimental* in character involving as they do the *development* of the fast reactor and the naval reactor . . . "

"The very high fuel ratings of the fast reactor and the nature of the other facilities at Dounreay are such that the management of this site should be of *exceptional* technical competence."

The committee which reviewed the British Atomic Energy Authority significantly took special care to single out the Dounreay site as a special and particularly difficult problem.

[18] Commenting on the hearings, the editors of *Nucleonics*, in a special "manual on nuclear reactor facilities" circulated in 1959, said that "In summary, the question of fast reactor safety is most likely one that can be eliminated by proper design. What constitutes proper design, however, is not yet completely understood." (See page 155 of this manual.)

commotion and pressure tended to speed up the necessary research. We still don't really know, but meanwhile let them build it. Maybe some day we'll know enough about the whole thing to decide if it is possible to operate it without "undue hazard."

When the decision of the Circuit Court was handed down, Robert W. Hartwell, PRDC General Manager, told the *Detroit Free Press:* "While no final decision has been reached, the PRDC anticipates that the Supreme Court review will be sought." Hartwell said that his people interpreted the decision to mean that the AEC could not grant a construction permit "unless it can make at that early stage *all* of the safety findings required for an operating license."

A spokesman for the United Auto Workers Union said that the court's ruling "is a victory for those of us in this heavily populated area who have a deep respect for the power of the atom." The union spokesman said that the court decision justified the contention of the unions that PRDC should have carried out more exhaustive studies before "stamping the Monroe site as 'okay' for construction."[19]

Chairman John McCone of the AEC issued a statement on June 13th, 1960 in which he said that the "issues raised by the court's decision are of very great importance to the Commission and to industry in connection with matters of public health and safety." McCone also said that he was consulting with the Department of Justice concerning "possible steps to test the June 10, 1960 decision" and that the Commission "is studying the implications of the decision on its developmental and regulatory programs."[20]

On June 14th, 1960 the *Boston Globe* noted the decision in an editorial and said that "it is difficult to understand why a facility of this kind should have been allowed to proceed four years while so important a matter as its potential hazard to public safety was left dangling."

"What is disquieting about the undertaking," said the *Globe*, "isn't the delays, but the disregard of the intent of Congress by those who seek to establish such plants in relatively congested areas. If the decision does nothing else, it has served the public interest in focusing attention on that issue."

Also on June 14th, Chairman McCone stated that "after consultation between the Department of Justice and the Commission, it has been decided that steps will be taken to test the June 10, 1960, decision of the U. S. Court of Appeals for the District of Columbia Circuit setting aside the Commission's issuance of a provisional construction permit to the Power Reactor Development Company for construction of the Enrico Fermi nuclear power plant at Lagoona Beach, Michigan."[21]

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[19] *Detroit Free Press*, June 11, 1960, page 5.

[20] AEC press releases on June 13, 1960.

[21] AEC press release dated June 14, 1960.

And They're On Our Side, Too . . .

"Other maps are such shapes, with their islands and capes
But we've got our brave Captain to thank"
(So the Crew would protest) "that he's bought us the best—
A perfect and absolute blank!"

—LEWIS CARROLL

Some observers at the PRDC hearings found it a distinct experience to sit through days of interrogation during the course of which counsel for the labor unions questioned nuclear physicists such as Dr. Hans A. Bethe. Professor Bethe holds a position at Cornell University and was a consultant to the promoters of the Detroit reactor. A fair summary of Dr. Bethe's analysis of the situation is as follows:—

> "By the application of theoretical physics to what we *now* know, it is my opinion that a fast breeder reactor of the general type proposed by PRDC can be constructed and operated in a populated community without undue risk to the public, and that it can be demonstrated, *when such reactor has been built*, that its operation is safe."[22]

Dr. Bethe added that the information to be developed by the projected research and developmental programs "will in my opinion eliminate any uncertainties that may now exist with respect to operation of the proposed PRDC reactor." Another professor, Dr. Manson Benedict, of M.I.T., stated that his attitude was "one of guarded optimism." Dr. Harvey Brooks, Dean of the School of Engineering and Applied Physics at Harvard, said "in all probability a fast breeder reactor of the PRDC design can be operated" without undue hazard to the health and safety of the public.[23]

In the brief filed by the applicant before the Commission, PRDC concedes that a provisional construction permit cannot be issued unless there is "reasonable assurance" that a reactor "of the general type proposed" could be safely operated at the site selected. As defined by counsel for PRDC, "reasonable assurance" means "such degree of certainty, persuasion, or confidence as may be expected or required under the particular circumstances."[24]

The task of the lawyers for the unions, who presumably know as little about nuclear physics as any other lawyers, was to test the atomic physicists, by cross examination, to determine whether or not their statements tended to demonstrate the fact of "reasonable

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[22] Narrative Testimony of Dr. Bethe, pages 1, 5-6, quoted in applicants brief before the AEC at page 60.

[23] Quotations appear in applicant's brief before the AEC, pages 60 and 61.

[24] Applicant's brief before the AEC at pages 36-37; also it is suggested that Gertrude Stein might be consulted for a definition such as "A reasonable is a reasonable, is a reasonable, is a reasonable, etc."

assurance" that there would be no "undue" hazard to health and safety.

We submit that it would be gross error to insist that this "reasonable assurance" could only be expressed in terms which could be understood by nuclear experts. If the atomic experts are unable to demonstrate safety, or "reasonable assurance" of safety, to the majority of the reasonably well-educated people in our society, it is they, and not we, who must suffer the consequences.

The aim of our American society is, or should be, one which is directed toward a "culture," not a mere technology. If we hope to preserve a position of world leadership, all of us must seek the ends which science, especially nuclear science, is to serve. We find ourselves now in an unfortunate situation; communication between scientists and the rest of us could be no worse if each group spoke a different language with no common root words. The result of this state of things is massive uncertainty and mutual misunderstanding and distrust.

We feel that Philippe Le Corbeiller, Professor of Applied Physics and General Education at Harvard, has already well stated the thought which we wish to express here:—[25]

> "Our urgent need today is for an American culture in which science and technology would play their role as two of the many parts of a harmonious whole.
>
> "To this end, a genuine knowledge of the basic sciences *must* be the possession of every man. The scientist or engineer needs it in order to see his own specialized work in the perspective of an over-all scientific and technical pattern. The non-scientist needs exactly the same basic scientific training because a glance at science from the outside will never give him an understanding of the inner springs of this new intellectual power.
>
> "The non-scientists are the men who, out of the findings of the natural and social sciences, must evolve a new culture in the humanistic sense. Not until lawyers, historians, novelists, playrights, newspapermen, and above all philosophers (who are already leading the way) learn the basic sciences in school and college shall we have the culture this age requires. The more science transforms our ways of life, the greater is the danger that the more literate among us may be unlettered in science."

We agree with all that Le Corbeiller has said, but we would also urge his thesis for another reason. If the lawyer, the historian, the novelist, and the newspaperman does not know science, the scientist does not know law, nor history, nor is he literate, nor does he understand politics, social justice nor government. The most serious defect of the scientist is that he lacks culture.[26]

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[25] See: "Daedalus," Winter, 1959, page 170, for an article by Philippe Le Corbeiller entitled "Education in Science; Prerequisite for National Survival." This issue of "Daedalus," which is published by the American Academy of Arts and Sciences is entirely devoted to "Education in the Age of Science."

[26] To the many scientists who are execptions to the rule—our abject apology.

As long as this cultural lag continues, each of us must find his way, as best he can, across the intellectual dismal swamp which separates us from the others.

* * * * *

In our next issue we will attempt to present the amazing story of the Cape Cod Nuclear Park. In this adventure all of the political, economic, moral, and social forces of society, informed and educated almost overnight by scientific experts, joined in a massive effort to defeat an ill-considered proposal for legislation which authorized activities on the Cape as hazardous as any yet proposed by man.[27] We shall also discuss the Yankee Reactor at Rowe, which goes "critical" (which means it starts up its neutrons, not that it blows up) this summer and fall.

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[27] See: "The Nation," June 25, 1960, for an article by Grace Des Champs of Cape Cod, Massachusetts, entitled: "The AEC Takes a Beating—Cape Cod's Atomic Park."

SUMMARY OF REPORT OF TREASURER
MILTON J. DONOVAN

MASSACHUSETTS BAR ASSOCIATION

ASSETS
June 1, 1960

Cash—Checking Account	$ 8,731.37	A
U. S. Treasury Bills, at Cost	34,646.11	B
Savings Accounts	15,000.00	C
Law Society Scholarship Fund, Securities at Cost	13,524.73	D
Nutter Fund	1,500.00	
Total	$73,402.21	

A. Includes following reserves:

Law Society Scholarship Fund, Uninvested	$ 820.50
Nutter Fund, Uninvested	186.30
Social Security and Withholding Taxes	222.28

B. Due June 3, 1960 at Face Value 35,000.00

C. See January 1, 1960 report for detail.

D. Market Value May 31, 1960 ..... 15,923.67

Consisted of:

Eaton & Howard Balanced Fund	792 shs. @ 10.97
Boston Fund	433 shs. @ 16.71

Note: Office Equipment purchased in 1960 not reflected in assets. Cost: $4,627.53.

MASSACHUSETTS BAR ASSOCIATION

STATEMENT OF INCOME AND EXPENSE
January 1, 1959 to January 1, 1960

Income:

Total Dues Received		$43,377.00
Law Society Scholarship Fund (Div.)	$ 487.09	
Savings Bank Interest Received	558.35	
U. S. Bond Interest Received	41.40	
Mass. Law Quarterly—Adv.	1,624.27	
Mass. Law Quarterly—Sales	43.60	
Total Other Income		2,754.71
		$46,131.71

Expenses:

American Bar Meeting	$ 113.00
Annual Institute	4,469.72
Board of Delegates	217.33
Central Office Expense	6,684.12
Court Centennial	100.00
Judge Dethmer's Reception	761.80
Dues & Conferences	200.00
Executive Committee Expense	1,256.79
Massachusetts Heritage	677.55

Medio-Legal Luncheon	37.00	
Mass. Law Quarterly Expense	9,752.62	
Mid-Winter Meeting Expense	2,281.46	
Membership Committee Expense	71.16	
New Members' Luncheon	230.90	
President's Expense	59.01	
Public Relations Committee	6,810.01	
Rent	3,415.00	
Salaries	7,685.00	
Secretary's Expense	500.00	
Small Business Meeting	302.80	
Treasurer's Expense	110.00	
Massachusetts Payroll Tax	4.10	
Total Expenses		45,739.37
Net Income 1959		$ 392.34

MASSACHUSETTS BAR ASSOCIATION

Statement of Income and Expense

January 1, 1960 to June 1, 1960

Income:

Dues Received		$59,892.00
Law Society Scholarship Fund (Div.)	$142.98	
Savings Bank Interest	256.25	
Nutter Fund Interest	20.70	
Mass. Law Quarterly—Adv.	595.00	
Mass. Law Quarterly—Sales	13.57	
Total Other Income		1,028.50
		$60,920.50

Expenses:

Annual Institute	$ 230.83	
Central Office Expense	3,589.55	
Court Centennial	15.00	
Board of Delegates	187.56	
Dues & Conferences	225.40	
Executive Committee	271.77	
Furniture & Fixtures	4,627.53	
Grievance Committee	56.00	
Mass. Law Quarterly Expense	4,487.25	
Medio-Legal Meeting	83.02	
Mid-Winter Meeting	996.34	
Membership Committee	21.95	
Junior Del. Committee	8.00	
President's Expense	35.93	
Public Relations Committee	1,009.36	
Rent	1,900.00	
Salaries	5,763.83	
Secretary's Expense	534.65	
U.S.A. Law Day	70.00	
Total Expenses		24,113.97
Net Income to June 1, 1960		$36,806.53

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